IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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INDEX

TABLE OF AUTHORITIES

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARKANSAS LOUISIANA GAS COMPANY prays that a Writ of Certiorari issue to review the judgment and decree of the Supreme Court of the State of Louisiana entered in this cause on March 5, 1979, amending the judgment of the Court of Appeal, Second Circuit, State of Louisiana, entered in the cause on May 1, 1978 and remanding the cause to the First Judicial District Court of Louisiana in and for Caddo Parish with directions.

I. OPINIONS BELOW.

A copy of the opinion and decree of the Supreme Court of Louisiana is attached in the Appendix to this petition, page 83a; the opinion is reported at 368 So.2d 984. Petitioner's application to the court for rehearing was denied on April 9, 1979; see Appendix, page 100a.

The judgment of which review is here sought was rendered in the same action in which review of an earlier judgment of the Court of Appeal, Second Circuit, State of Louisiana, is sought by Petitioner in a pending petition for writ of certiorari in No. 78-986. On February 21, 1979 this Court issued an order requesting the Solicitor General of the United States to file a brief stating the views of the United States. After consultation between Petitioner's attorneys and the Clerk of this Court, Petitioner was authorized to incorporate herein by reference the appendix to its earlier petition. The appendix to that petition contains pages 1a to 65a, and the opinion of the Supreme Court of Louisiana of March 5, 1979 is attached to Petitioner's supplemental brief in No. 78-986, pages 66a to 82a, although a copy of the opinion is also attached to the Appendix of the present petition, which is numbered[1] beginning with page 83a.

Earlier opinions in the suit are as follows:

> Opinion and decree of the Court of Appeal, Second Circuit, State of Louisiana, App. 986, p. 2a, reported at 359 So.2d 255, May 1, 1978.

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[1] References to the appendix in No. 78-986 will be made as "App. 986, p. —a," and references to the Appendix to the present petition will be made as "App. p. 83a," etc.

Orders of the Court of Appeal denying applications of Petitioner and Respondents for rehearing, App. 986, p. 21a, June 6, 1978.

Order of the Supreme Court of Louisiana denying Petitioner's application for review of the judgment of the Louisiana Court of Appeal, App. 986, p. 22a, September 22, 1978.

Order of the Louisiana Supreme Court granting Respondents' application for review of the judgment of the Louisiana Court of Appeal, App. 986, p. 23a, September 22, 1978.

Opinion of the First Judicial District Court of Louisiana in and for Caddo Parish, App. 986, p. 24a, October 14, 1977.

Opinion of the district court denying new trial, App. 986, p. 39a, December 2, 1977.

Judgment of the trial court, App. 986, p. 44a, December 5, 1977.

II. JURISDICTION.

The judgment of the Supreme Court of the State of Louisiana was entered March 5, 1979 and rehearing was denied on April 9, 1979; the judgment of the Supreme Court of the State of Louisiana of which review and reversal are here sought is, under the judicial and procedural system of Louisiana, a judgment of the highest court of the State of Louisiana in which a decision of this cause could be had. The judgment of which review is sought is a final judgment within the meaning of the jurisdictional statute, *U.S. Code* Title 28, § 1257 (3) (App. 986, p. 1a) as interpreted by this Court in its

recent decisions, particularly, *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469 (1975).

III. QUESTIONS PRESENTED.

While the questions specified in No. 78-986 should be determinative of this case, they were not discussed in the opinion of the Louisiana Supreme Court because, under a Louisiana procedural rule, they were held to be finally settled by the judgment of the Louisiana Court of Appeal and the Supreme Court's denial of review of that judgment. See note 4 of the court's opinion (App. p. 89a), which we quote as follows:

> "362 So.2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This Court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So.2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us."

The questions presented in this case are: (1) whether the court below erred as a matter of jurisdiction and law in awarding Respondents, as damages for breach of contract, a retroactive price increase for their natural gas sold to Petitioner in interstate commerce for resale, higher than the Respondents' rate on file with the Federal Power Commission in accordance with the *Natural Gas Act* and Regulations thereunder based

upon the Court's holding that state law excused Respondents from compliance with federal law and that the Federal Power Commission would have approved the higher rate had it been filed; (2) whether the court erred in failing to refer to the Commission the interpretation of the favored nation provision of Respondents' FPC Rate Schedule, whether the favored nation provision was activated, and, if the favored nation provision were activated, the prices that Respondents may collect under the *Natural Gas Act* and the Regulations thereunder; and (3) whether the Court of Appeal's judgment as to the Small Producer status of Respondents and the computation of their recovery was in accordance with the *Natural Gas Act* and the Commission Regulations. Questions No. 2 and 3 are also presented in No. 78-986.

IV. STATUTES AND REGULATIONS INVOLVED.

The statute of the United States involved, rights under which have been denied to Petitioner by the Louisiana courts, is Section 4 of the *Natural Gas Act,* 52 Stat. 822, 15 USC § 717c, and Regulations thereunder of the Federal Power Commission (the "Commission"), *Code of Federal Regulations,* Title 18, §§ 154.92, 154.93, 154.94, 154.95, 157.40, copies of which are at App. 986 pp. 52a, 54a, 55a, 60a, and 60a.

V. STATEMENT OF THE CASE.

Petitioner refers to pages 4 to 12 of its Petition for *Certiorari* in No. 78-986 for an extended statement of the facts and history of this procedurally complicated case prior to the decision of which review is here sought. Petitioner adds only a description of the opin-

ion and decree of the Supreme Court of Louisiana of which review is here sought.

The decision of the Louisiana Supreme Court amended the judgment entered by the Louisiana Court of Appeal, Second Circuit by awarding higher rates to Respondents for the period of time Respondents had not complied with the applicable filing requirements of the *Natural Gas Act* and the Commission's Regulations which were a prerequisite to the right to collect the higher rates. The Court of Appeal had previously determined that Respondents could not collect higher rates during this period of time that they were subject to the rate increase filing requirements of Section 4(d) of the *Natural Gas Act,* 15 U.S.C. § 717c(d) (App. 986 pp. 13a, 48a). The period of time involved was that period before several of the Respondents became small producers in October of 1972.[2] The Louisiana Supreme Court determined that Respondents were prevented by Arkla from fulfilling the rate increase filing requirements of the *Natural Gas Act* because Respondents were not informed that Petitioner had made market value royalty payments to the United States government, which royalties were calculated on the basis of a value higher than the prices paid by Petitioner to Respondents (App. p. 92a).[3] The court held that in

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[2] The issue as to which of the Respondents qualified for and became "small producers" in October of 1972 is currently pending in proceedings before the Commission. See Petition for writ of certiorari in No. 78-986, p. 8, n.3. "Small producers" are exempt from the rate increase filing requirements of the *Natural Gas Act* (App. 986, p. 60a).

[3] The foundation of the decision was the "triggering" issue—that is, whether Petitioner's market value royalty payments trig-

these circumstances, Respondents were excused from compliance with the *Natural Gas Act*. The court stated (App. p. 92a):

> "Pursuant to article 2040 [of the Louisiana Civil Code] and this court's jurisprudence interpreting that article, the condition (that [Respondents] file new rate schedules) is considered fulfilled. Hence [Respondents'] failure to file the new rate schedules in no way precludes [Respondents'] recovery of damages for the entire period of [Petitioner's] breach (September 1961 through December 31, 1975) as measured by the difference in the price [Petitioner's] paid the United States government and the price [Petitioner] paid [Respondents]. To hold otherwise would be in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court."

The court also determined that having eliminated the statutory rate increase filing requirements under the *Natural Gas Act* it could determine the rate that the Commission would have authorized Respondents to collect.[4]

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gered the favored nation provision in Respondents' FPC Rate Schedule. Having denied Petitioner's application for review, the court applied the Court of Appeal's determination that triggering had occurred. It is Petitioner's position that the triggering issue should have been referred to the Commission for decision and that the state court decision is contrary to federal regulatory law, *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied sub. nom., *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972). This issue is currently before this Court in No. 78-986.

[4] As Petitioner hereinafter shows, this emphasizes the court's error in failing to refer to the Commission these matters which involve its exclusive jurisdiction. These matters should not be the subject of speculation by the courts. See infra, pp. 10-14.

The Louisiana Supreme Court remanded the proceeding to the state district court for a calculation of the price increase to be awarded Respondents in the form of damages for breach of contract (App. p. 98a).[5]

VI. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. The Louisiana Supreme Court's decision underscores the error committed by the Court of Appeal in not referring to the Commission the issue of interpretation of Respondents' FPC Rate Schedule. The error has now been compounded because the Louisiana Supreme Court has infringed further upon the Commission's exclusive rate jurisdiction and has exalted state law over the paramount federal regulatory scheme set down by Congress in the *Natural Gas Act.*[6]

The Louisiana court sought to ignore the rate increase filing requirements of the *Natural Gas Act* as

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[5] The court upheld the Court of Appeal's determination that W. E. Hall, Jr., could not collect an increase in price after May 25, 1969, at which time the Rate Schedule was amended as to his interest to delete the favored nation clause (App. p. 98a). Recovery was permitted by the Louisiana Supreme Court's decision as to the prior period of time.

[6] It should also be noted that Congress on November 9, 1978 enacted the *Natural Gas Policy Act of 1978,* 92 Stat. 3350. The *Natural Gas Policy Act* continues the legislative scheme of the *Natural Gas Act* as applied to natural gas dedicated on the day before the date of enactment which is the case here. The Commission also recently issued final regulations setting forth a detailed rule as to the "triggering" of price escalator clauses wherein it reaffirmed its regulatory responsibility to determine when triggering occurs and the rate consequences of triggering, if any. See "Final Regulations Amending And Clarifying Regulations Under The Natural Gas Policy Act And the Natural Gas Act," No. RM 79-22, 44 F.R. 13460 (March 12, 1979).

applied to Respondents. The court did not find that the rate increase filing requirements of the *Natural Gas Act* did not apply to Respondents—but that, under the Louisiana Civil Code, Respondents' filing requirements should be considered to be fulfilled (App. p. 92a). It even went so far as to make a finding as to what the Commission would have decided if Respondents had made the filing.

The Commission has exclusive jurisdiction over the rate increase filing requirements of the *Natural Gas Act* and these paramount federal regulatory requirements cannot be undone by state law. In *Ashland Oil & Refining Co.* v. *F.P.C.*, 421 F.2d 17, 20 (6th Cir. 1970), the court stated the matter concisely and clearly:

> "Under the Natural Gas Act matters of rate regulation, filing and notice procedures are within the express statutory authority of the Commission. 15 U.S.C. § 717c. This is an area in which the Commission, pursuant to Congressional authorization, has promulgated regulations. 18 C.F.R. Chapter 1, Subchap. E, §§ 154.91, 154.94. Under this act and regulations, as construed by the Commission, a change in rate levels cannot become effective without the filing of a rate change with the Commission."

The dispute in the *Ashland* case centered around a contract clause providing for increases in seller's rate measured against buyer's resale rate and the buyer's obligations with respect to the seller's rate filing requirements. The Commission found that because the producer-seller had not made the requisite filing for the rate increase under Section 154.94 of the Regulations (App. 986, p. 55a) and Section 4(d) of the *Natural Gas Act*, the higher rate could not be collected. The Sixth Circuit upheld the Commission's determination.

This rule of law applies with equal force to the instant case. The Commission, and only the Commission, has jurisdiction to determine what Respondents' filing requirements are and whether or not they have been fulfilled.

Moreover, it is the federal regulatory scheme that governs, not state law. The paramount nature of federal regulation under the *Natural Gas Act* over jurisdictional transactions is well established. See *Northern Natural Gas Co.* v. *State Corp. Commission,* 372 U.S. 84 (1963), and other cases cited in Petitioner's petition in No. 78-986, pp. 19-20.

It is clear beyond cavil, then, that the Commission has exclusive jurisdiction over the filing requirements of the *Natural Gas Act* and that the federal regulatory scheme is paramount. It is equally clear that the Louisiana courts have infringed upon the exclusive jurisdiction of the Commission in applying state law in their attempt to bypass the rate filing requirements of the *Natural Gas Act.*

B. As a related point, Petitioner submits that the Louisiana Supreme Court intruded upon the Commission's exclusive jurisdiction in remanding the case to the lower Louisiana court for a calculation of the jurisdictional rate increase to be collected by Respondents from Petitioner in the guise of damages.

Under the *Natural Gas Act,* the Commission, and only the Commission, has jurisdiction to determine the rates to be charged for gas sold by Respondents. *Colorado Interstate Gas Co.* v. *F.P.C.,* 324 U.S. 581 (1945); *Natural Gas Pipeline Co.* v. *Panoma,* 349 U.S. 44 (1955); *Montana-Dakota Utilities Co.* v. *Northwestern*

Public Service Co., 341 U.S. 246 (1951); *Socony-Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962), cert. denied 371 U.S. 887 (1962); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir. 1947), cert. denied 332 U.S. 770 (1947); *McLeran* v. *El Paso Natural Gas Co.*, 357 F. Supp. 329, 331-32 (S.D. Tex. 1972).

In *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co., supra,* the issue was quite similar to that here. In addressing the operation of a Favored Nation clause and the requirements of the Commission for the filing of rate changes, the court stated, 162 F.2d at 390:

> "*Rate-making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate to transfer the legislative function of rate-making from the Commission to the courts.*" [Emphasis added.]

Once again, a court has no power or authority to authorize a change of rates for the sale of natural gas in interstate commerce. That responsibility is vested solely in the Commission.[7]

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[7] In accordance with the instructions on remand from the Louisiana Supreme Court, the Louisiana district court entered its judgment assessing damages on May 17, 1979 (App. p. 101a). This judgment violates the *Natural Gas Act* and Commission's Regulations in several respects, particularly by prescribing a change in rates which substantially exceeds the Commission's "just and reasonable" regulated rates. See Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, App. 986, pp. 48a. So, too, the Louisiana courts have calculated rates on the erroneous assumption that the Commission's rate jurisdiction does not cover liquefiable hydrocarbons entrained in the natural gas stream (as distinguished from ex-

Under the *Natural Gas Act,* it is also the case that Respondents are entitled only to the rates "on file . . . and in effect." This result is prescribed by the "filed-rate doctrine." See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; Hope Natural Gas Co.* v. *F.P.C.,* 134 F.2d 287 (4th Cir. 1943), rev'd on other grounds 320 U.S. 591 (1944); *Socony-Mobil Oil Co., Inc.* v. *Brooklyn Union Gas Co., supra; Mississippi River Fuel Corp.* v. *F.P.C.,* 202 F.2d 899, 903-4 (3rd Cir. 1953); *Cf. Continental Oil Co.* v. *F.P.C.,* 236 F.2d 839 (5th Cir. 1956), cert. denied, 352 U.S. 966 (1957); *Shell Oil Co.* v. *F.P.C.,* 334 F.2d 1002, 1009 (3rd Cir. 1964).[8]

The court is also wrong in its conclusion that a retroactive rate can be given by a court in Louisiana simply by labeling it damages. In *Natural Gas Pipeline Co.* v. *Harrington,* 246 F.2d 915 (5th Cir. 1957), the court passed on a claim by the pipeline for reparations be-

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tracted liquids). See, *Permian Basin Area Rate Case,* 390 U.S. 747, 819 (1968); *Mobil Oil Corp.* v. *Federal Power Commission,* 483 F.2d 1238 (D.C. Cir. 1973); *El Paso Natural Gas Co.,* 29 F.P.C. 1175, 1179-80, 1207-08 (1963).

[8] If, however, the Commission determined that a higher rate could be collected by Respondents, certainly an amendatory rate filing would be required. See *Plaquemines Oil and Gas Co.* v. *F.P.C.,* 450 F.2d 1334 (D.C. Cir. 1971). In that case there was no filed rate because a certification had not been obtained from the Commission authorizing the transaction in the first instance. In those circumstances, it was held that the Commission could establish a rate retroactively. While the decision constitutes a limited exception to the bar against retroactive rate-making (which exception is not applicable here), the decision supports Petitioner's position that if the filed-rate doctrine is to be pierced, it can be done so only by the Commission in authorizing a retroactive rate increase filing and in determining the rate increase that Respondents would be authorized to collect.

cause of sums paid to a producer under an invalid minimum price order of the Oklahoma State Corporation Commission. The court said, 246 F.2d 918:

> "Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission . . ."

See also, *Interstate Natural Gas Co.* v. *Southern California Gas Co.,* 102 F.Supp. 685 (S.D. Cal. 1952), where the court said, 102 F.Supp. at 688:

> "As these cases show, the plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction. *The plaintiff cannot show damage save by showing that the Commission would approve some rate structure and some practice other than that presently existing.*" [Emphasis in original.]

In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* this Court addressed the point concluding that courts do not possess jurisdiction to award damages as to jurisdictional rates simply because the complaining party alleges that he has been denied an administrative remedy. This Court said, 341 U.S. at 250:

> "Petitioner gives its case a differ (sic) cast by alleging that . . . its predecessor was deprived of its independence and power to resort to its administrative remedy. But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The

petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pin-point. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce. Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.*" [Emphasis added.]

C. We refer the Court to the Petition for Certiorari in No. 78-986, Subdivision VI, pages 12 to 23, for our argument upon the questions specified in the present application which have already been brought before the Court in No. 78-986.

VII. CONCLUSION.

For the reasons stated, a writ of certiorari should be granted in this case to review the judgment rendered herein on March 5, 1979 by the Supreme Court of the State of Louisiana; and that judgment should be summarily reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 62,560

FRANK J. HALL, ET AL

v.

ARKANSAS-LOUISIANA GAS COMPANY

ON WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEAL
PARISH OF CADDO, STATE OF LOUISIANA

March 5, 1979

MARCUS, Justice*

Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract.

Planitiffs, in their original and amended and supplemental petitions, alleged that on January 11, 1952, they, or their respective ancestors in title, entered into a gas purchase agreement with defendant wherein plaintiffs agreed to sell to defendant their natural gas, and the natural gas owned by their respective lessors, produced from certain described lands in the Sligo Gas Field, Bossier Parish, Louisiana. This agreement, by its terms, was to continue in effect from January 11, 1952, through June 1, 1980. Under the terms and provisions of this agreement, defendant was to pay a fixed schedule of prices for the natural gas delivered to it from plaintiffs. This agreement also contained a price adjustment provision, com-

* Chief Judge William A. Culpepper participated in this decision as Associate Justice Ad Hoc sitting in the place of Chief Justice Sanders, retired.

monly referred to as a favored nations clause, which provided in pertinent part:

> If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract. . . . It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

Plaintiffs alleged that since January 11, 1952, they and their respective lessors, have sold substantial quantities of natural gas produced from wells in the Sligo Gas Field to defendant at the prices stipulated in the fixed schedule of prices as contained in the agreement. Plaintiffs further alleged that from September 1961 until the date of the institution of this action, defendant purchased from another party seller (the United States government) natural gas produced from wells located in the Sligo Gas Field at a higher price (including prices paid for both the residue or dry gas and the liquid hydrocarbons or plant products extracted from the United States government's gas delivered to defendant's pipeline system) than it was paying to plaintiffs pursuant to the January 11, 1952 gas purchase agreement for plaintiff's dry or residue gas and liquid hydrocarbons or plant products extracted from plaintiff's gas and delivered into defendant's pipeline system. By

paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field, plaintiffs contended that defendant activated the provisions of the favored nations clause and legally obligated itself to advise plaintiffs of these facts and pay plaintiffs the higher price being paid to another party seller (the United States government) for natural gas produced from wells in the Sligo Gas Field. Plaintiffs contended that they were entitled to such higher price from the first time defendant paid such higher price to another party seller. Plaintiffs averred that defendant had at no time during the existence of the January 11, 1952 agreement informed plaintiffs, or any of their representatives, of the fact that it had been paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs thus argued that defendant had breached the favored nations clause of their agreement by failing to pay plaintiffs a price equal to the highest price paid by defendant to any other party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs sought damages equal to the difference between the price paid to them and the highest price paid by defendant to any other party seller for such natural gas during the period of time that defendant purchased natural gas from the United States government.

In its answer, defendant admitted that it purchased substantial quantities of natural gas from plaintiffs pursuant to the January 11, 1952 gas purchase agreement. Defendant, however, averred that it had not at any time paid anyone a price higher than that paid plaintiffs for natural gas purchased from the Sligo Gas Field and it specifically denied that it was purchasing any natural gas produced from the Sligo Gas Field from the United States government. Further answering the petition, defendant alleged that the only contract between it and the United States government relating to the production of natural gas from the Sligo Gas Field was an oil, gas, and mineral lease

dated January 23, 1961, and executed by the United States Department of the Interior in favor of Union Producing Co. and covering land situated in the Sligo Gas Field. Defendant averred that it acquired an undivided 15% interest in this lease by virtue of an assignment from Union Producing Co. on January 30, 1961, and argued that this lease did not constitute an offer or contract to sell natural gas, but, rather, granted defendant only the right to explore for, remove, and dispose of oil and gas. Hence, defendant contended, the only payments made by it to the United States government were the payments of royalty (based on the value of the natural gas and other products extracted from the natural gas) as provided in the lease and not payments for the purchase of natural gas from the United States government.

By supplemental and amended answer, defendant further alleged that the Federal Power Commission, pursuant to the provisions of the Natural Gas Act (15 U.S.C. § 717 a-w) had sole jurisdiction over the sale of natural gas by plaintiffs to defendant under the January 11, 1952 gas purchase agreement upon which this action was founded. Defendant contended that, pursuant to 15 U.S.C. § 717c (d),[1] plaintiffs were required to file and give notice of any

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[1] 15 U.S.C. § 717c(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty day's notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

proposed increase of rates, including any contractually-authorized rate increase, above the authorized initial rate and that, as plaintiffs had failed to file for such rate increase allegedly allowable under the favored nations clause, they were not lawfully authorized to collect the increased rate in this action. In addition, defendant averred that one of the named plaintiffs, W. E. Hall, Jr., executed, on May 25, 1969, an amendment to the gas purchase agreement of January 11, 1952, which deleted the favored nations clause from his contract with defendant. In view of this amendment, defendant contended that W. E. Hall, Jr. had no cause or right of action for any claim against defendant arising on or after May 25, 1969.

The trial court first held that payments made by defendant to the United States government under the terms of the lease constituted a "purchase from another party seller" within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States government and the price paid plaintiffs) for the period subsequent to the issuance of small producer certificates to plaintiffs in October 1972. The court reasoned that plaintiffs could not recover a "raise in prices" for the period prior to October 1972 because they had never obtained approval of a higher rate or price from the Federal Power Commission as required by 15 U.S.C. § 717c-d. The trial judge noted, however, that the regulations of the Commission (18 C.F.R. § 157.40) provide

that a "small producer," as defined in the regulations, may obtain a small producer certificate from the Commission exempting it from the necessity of filing a rate schedule in order to obtain contractually-authorized rate increases if the rate increase does not exceed the ceiling rate set by the Commission. The trial judge determined that plaintiffs had obtained such "small producer certificates" in October 1972 and concluded that plaintiffs would be entitled to a recovery of damages for the period from October 1972 through December 1975. The trial court then determined that, because W. E. Hall, Jr. amended his contract with defendant on May 25, 1969, and deleted the favored nations clause from his contract, he had no claim against defendant under the favored nations clause subsequent to May 25, 1969, and would be entitled to no recovery of damages.

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors) only for the period from October 1, 1972 through December 31, 1975.[2] In addition, the court of appeal held that W. E. Hall, Jr. had waived any claim for damages against defendant for the period subsequent to May 25, 1969, by entering into an amended contract with defendant on that date which deleted the favored nations clause from his contract.[3]

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[2] The court of appeal found that the calculations used by the trial judge to determine the amount of damages for the period from October 1, 1972 through December 31, 1975 were based on plaintiffs' calculations representing the entire period of the breach (September 1961 through December 31, 1975). The appellate court thus ordered the case remanded for a new trial restricted to the assessment of damages.

[3] 359 So. 2d 255 (La. App. 2d Cir. 1978).

We denied defendant's application for a writ to review the correctness of the court of appeal's decision.[4] However, on application of plaintiffs, we granted a writ limited to a consideration of whether the court of appeal was correct in denying an award of damages to plaintiffs for the period of defendant's breach prior to October 1972 and whether it was correct in holding that W. E. Hall, Jr. "waived" any claim for damages against defendant by entering into an amended contract on May 25, 1969, which deleted the favored nations clause from his contract.[5]

We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas

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[4] 362 So. 2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So. 2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us.

[5] 362 So. 2d 798 (La. 1978).

Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). The first issue presented for our resolution is a determination of whether plaintiffs are entitled to a recovery of the difference between such prices for the entire period of defendant's breach of the contract (September 1961 through December 31, 1975) or whether plaintiffs are precluded from a recovery of damages representing the period prior to October 1972.

Unless the Federal Power Commission otherwise orders, no change shall be made by any natural gas company in any rate received by it for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or contract relating thereto, except after thirty days' notice to the Commission and to the public. 15 U.S.C. § 717c(a) & (d). Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when such changes will go into effect. *Id.* (d). A "small producer" (as defined by the Commission's regulations) may obtain a "small producer certificate" exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40. Several of the plaintiffs obtained "small producer certificates" in October 1972, and the certificates

issued to those parties were made effective as to all plaintiffs by order of the Commission. It is not disputed by the parties before us that the only rate schedule ever filed by plaintiffs with the Commission was the original gas purchase contract entered into on January 11, 1952. The trial court and court of appeal denied plaintiffs an award of damages arising from defendant's breach of contract for the period of time (*i.e.*, prior to October 1972) during which plaintiffs were required to file new rate schedules with the Commssion reflecting their entitlement under the contract, to a higher price for their natural gas sold to defendant.

La. Civ. Code art., 2040 provides:

> The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it.

It is difficult to attach a precise meaning to the rule as it is literally set forth in the text of article 2040. This court, however, has long recognized that the English translation of this provision from the French articles as written in the Louisiana Civil Codes of 1825 (article 2035) and 1808 (article 78) is inaccurate and the French text has always prevailed in decisions of this court. *See* George W. Garig Transfer v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Morrison v. Minton, 163 La. 1065, 113 So. 456 (1927); Walls v. Smith, 3 La. 498 (1832) (dissenting opinion). Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra.* This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one

should not be able to take advantage of his own wrongful act. *See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1962).

The favored nations clause of the contract entered into between plaintiffs and defendant provided that, if defendant purchased from another party seller gas produced from any wells located in the Sligo Gas Field at a higher price than was provided to be paid for plaintiffs' gas, defendant was bound to pay plaintiffs for the gas delivered under their contract at a price increased by an amount equal to the differences between the price provisions of plaintiffs' contract with defendant and the concurrently effective higher price provisions of defendant's contract with the other party seller. To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the

spirit and intent of article 2040 and the jurisprudence of this court.[6]

The court of appeal also reasoned that plaintiffs' recovery of damages for the period of defendant's breach prior to October 1972 must be denied because such recovery would necessarily assume that a price increase would have been granted by the Commission. The appellate court concluded that the issue as to whether such approval would have been granted by the Commission was highly speculative and could not serve as a basis for an award of damages.

Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectural. Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914). It must appear reasonably certain that the amount of damages rests upon a certain basis. Brown v. Producers' Oil Co., *supra*. Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. *Cf.* Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971). The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its

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[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, "[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition." 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959).

breach. The question of the certainty of proof of damages becomes a matter for decision in each individual case. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 199 So. 656 (1940).

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely. It is our opinion that, taking the evidence as a whole, plaintiffs' proof shows that it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed. It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

We must next determine whether W. E. Hall, Jr. waived any claim against defendant for damages arising on and after May 25, 1969, because, on that date, he entered into a contract with defendant wherein he deleted the favored nations clause from the January 11, 1952 agreement. Plaintiffs argue that Hall executed the May 25, 1969 agreement

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[7] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

without being informed by defendant that it had activated the favored nations clause of the original agreement and that defendant misrepresented facts to Hall by informing him that it was paying plaintiffs the highest prices that it was paying any other party sellers for gas produced from the Sligo Field. Plaintiffs contend the May 25, 1969 agreement is void because Hall executed it under an error of fact.

Hall's testimony indicates that in 1969 he possessed an interest in a well (referred to as the Harvey well) under contract to Texas Gas Producing Company (Texas) with the natural gas produced therefrom being sold to Texas. In 1969, the Harvey well was nearly depleted and its pressure was dropping. The pressure on the Texas pipeline serving the Harvey well was too high for such gas to be carried through the pipeline. Hall stated that he was confronted with a situation where he was either going to have to "junk the well," buy a compressor and continue selling to Texas, or obtain a release from Texas and sell to another party with a lower pipeline pressure. After learning that the pressure on defendant's pipelines was lower than that on Texas' pipelines, Hall obtained a release from Texas and negotiated with defendant to take the gas from the Harvey well. An agreement was executed wherein defendant amended the January 11, 1952 gas purchase agreement to also cover Hall's share of the production from the Harvey well. This amendment also deleted the favored nations clause from the January 11, 1952 gas purchase contract. Hall maintained that had he been aware of the fact that defendant was paying a higher price to another party seller in the Sligo Field, he would not have agreed to the deletion of the favored nations clause. Hall also stated that his primary purpose in executing the May 25, 1969 agreement with defendant was to avoid having to purchase and operate a compressor and to be able to continue selling gas from the Harvey well.

Consent of the parties legally given is a requisite to the validity of a contract. La. Civil Code art. 1779. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent where it has been produced by error. La. Civil Code art. 1819. An error of fact proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. La. Civil Code art. 1821. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. La. Civil Code art. 1823. To have that effect, the error must be in some point, which was a principal cause for making the contract and when there are several this principal cause is called the *motive* and means that consideration without which the contract would not have been made. *Id.* & art. 1825. No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it. La. Civil Code art. 1826. These articles of our Code simply mean that error in the determining motive, or principal cause, of a contract vitiates consent and invalidates the contract. Error as to a subsidiary motive has no effect upon the validity of the contract. Cryer v. M & M Manufacturing Co., Inc., 273 So. 2d 818 (La. 1972); Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964); Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954).

A review of the record convinces us that the error relied upon by plaintiffs to invalidate the May 25, 1969 agreement was not an error in the determining motive, or principal cause, of the agreement. Hall's testimony clearly indicates that the determining motive, or principal cause, of the agreement was his desire to continue selling gas from the Harvey well and to avoid purchasing and operating a

compressor for the Harvey well. Any error relating to the issue as to whether defendant had activated the favored nations clause of the original agreement was only error as to a subsidiary motive and has no effect upon the validity of the May 25, 1969 agreement. Hence, we determine that the May 25, 1969 agreement is not invalid as having been executed by Hall under an error of fact.

We construe plaintiffs' allegations as a contention that the misrepresentations and omissions of defendant invalidated the contract because they constituted fraud.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. La. Civil Code art. 1847. Two elements are essential to constitute legal fraud: the intention to defraud and loss or damage or a strong probability of loss or damage. Buxton v. McKendrick, 223 La. 62, 64 So. 2d 844 (1953). It is well setted that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced. Buxton v. McKendrick, *supra;* Sanders v. Sanders, 222 La. 233, 62 So. 2d 284 (1952).

The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud.[8] Hence,

[8] In fact, it appears that the deletion of the favored nations clause from the original agreement was an effort by defendants to comply with the orders and regulations of the Federal Power

the May 25, 1969 agreement executed by W. E. Hall, Jr. cannot be invalidated on the basis of alleged fraudulent conduct of defendant.

In sum, we conclude that the May 25, 1969 amendment to the original gas purchase contract executed by W. E. Hall, Jr. is a valid and enforceable agreement. Since the effect of this agreement was to delete the favored nations clause from the original contract, W. E. Hall, Jr. has no claims for damages against defendant arising on or after May 25, 1969.

Decree

For the reasons assigned, judgment of the court of appeal is amended to allow plaintiffs (except W. E. Hall, Jr.) an award of damages measured by the difference between the price paid the United States government and the price defendant paid plaintiffs for the entire period of defendant's breach of contract from September 1961 through December 31, 1975; W. E. Hall, Jr.'s recovery of damages against defendant is to be measured for the period of time from September 1961 through May 24, 1969. The case is remanded to the district court for assessment of damages in accordance with the views herein expressed.

Commission. By Order No. 232 A (25 F.P.C. 609), issued March 31, 1961, the Commission amended its regulations so as to provide that indefinite price escalation clauses (including favored nations clauses) in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission would be inoperative and of no effect at law. By Order No. 242 (27 F.P.C. 339), issued February 8, 1962, the Commission further amended its regulations to provide for the rejection of contracts containing such indefinite escalation clauses. *See* 18 C.F.R. §§ 154.93, 157.14 and 157.25.

Supreme Court of Louisiana

No. 62560

Frank J. Hall et al.

Versus

Arkansas-Louisiana Gas Company

Dixon, Justice (concurring)

I fully subscribe to the opinion, but believe C.C. 2040 is applicable only by analogy, and that C.C. 2040 is probably a clarification of the original French text, not an "inaccurate" translation.

APPENDIX B

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112
FOR IMMEDIATE RELEASE

On the 9th day of April, 1979, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * *

REHEARINGS DENIED:

* * *

62,560 HALL v. ARK-LA. GAS

APPENDIX C

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 225,699

FRANK J. HALL, et al

versus

ARKANSAS LOUISIANA GAS COMPANY

JUDGMENT

The Louisiana Supreme Court in the case of "*Frank J. Hall, et al v. Arkansas Louisiana Gas Company,* Docket Number 62,560, Supreme Court of Louisiana" on March 5, 1979 rendered a judgment on the merits of this contractual dispute. The judgment of the Louisiana Supreme Court dated March 5, 1979 became definitive on April 9, 1979 when the Louisiana Supreme Court denied Arkansas Louisiana Gas Company's "Application For a Rehearing".

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record of this case there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs compensatory damages in the sums as hereinafter set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through December, 1975, to wit:

FRANK J. HALL	— $423,167.91
VIRGIL J. HALL, widow	— 115,409.27
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	— 634,233.61

John K. Harrell, Sr.	—	79,278.48
James E. Harrell	—	79,278.48
Elva L. Weiss, widow	—	177,666.20
National American Bank, Executor under Will of Seymour Weiss	—	177,666.20
T. F. Philyaw	—	3,712.38
W. O. Cochran	—	14,513.62
D. B. McConnell	—	132,193.25
S. G. Myers	—	130,215.91
James A. Noe, Jr. and C. T. Munholland, Testamentary Executors under Wills of Mr. & Mrs. James A. Noe	—	478,528.37
Asa Benton Allen	—	67,282.56
Elaine Allen	—	65,234.33

It Is Ordered, Adjudged and Decreed that the above and foregoing Plaintiffs are awarded legal interest on $1,677,-168.06 of the above and foregoing compensatory damages from July 1, 1976 until paid and that the remaining damages, i.e. $901,212.51, shall not bear or accrue any legal interest whatsoever.

It Is Ordered, Adjudged and Decreed that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record in this case there shall be judgment herein in favor of Mr. W. E. Hall, Jr., Plaintiff, against the Defendant, Arkansas Louisiana Gas Company, awarding to said Plaintiff compensatory damages in the sum as herein set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through May 24, 1969, to wit:

W. E. Hall, Jr.	—	$160,507.83

IT IS ORDERED, ADJUDGED AND DECREED that W. E. HALL, JR. is awarded legal interest on \$97,208.42 of said compensatory damages from May 25, 1969 until paid and that \$63,299.41 of the damages as awarded to Mr. W. E. Hall, Jr. shall not bear or accrue any legal interest whatsoever.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded a recovery herein for all costs of this proceeding.

JUDGMENT READ, RENDERED AND SIGNED on May 17, 1979 at Shreveport, Louisiana.

/s/ C. J. BOLIN, JR.
C. J. Bolin, Jr.
District Judge

Endorsed Filed, W. C. Young, Deputy Clerk, May 17, 1979.

A True Copy—Attest

/s/ W. C. YOUNG, Deputy Clerk

No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

JOINT APPENDIX

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MARLIN RISINGER, JR.
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Counsel for Respondents

PETITION FOR CERTIORARI FILED MAY 29, 1979
CERTIORARI GRANTED JANUARY 19, 1981

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

vs.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

TABLE OF CONTENTS

Table of Contents Continued

Table of Contents Continued

Table of Contents Continued

Table of Contents Continued

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

CHRONOLOGICAL LIST OF IMPORTANT DATES

Date	*Court & Case No.*	*Action*
7/18/74	District Court, Bossier Parish, LA, No. 41,599	Suit Filed
10/21/74	District Court, Caddo Parish, LA, No. 225,699	Suit transferred from Bossier Parish District Court and commenced in Caddo Parish District Court
7/30/75	District Court, Caddo Parish, LA, No. 225,699	Opinion on Arkansas Louisiana Gas Company's Declinatory Exception to Subject Matter Jurisdiction
9/26/76-1/14/77	District Court, Caddo Parish, LA, No. 225,699	Trial
10/14/77	District Court, Caddo Parish, LA, No. 225,699	Opinion on the merits

Date	*Court & Case No.*	*Action*
12/2/77	District Court, Caddo Parish, LA, No. 225,699	Opinion on Defendant's Motion for New Trial and Plaintiffs' Motion for New Trial
12/5/77	District Court, Caddo Parish, LA, No. 225,699	Judgment
3/27/78	La. 2nd Circuit Court of Appeal, No. 13,549	Oral argument
5/1/78	La. 2nd Circuit Court of Appeal, No. 13,549	Opinion and Decree
6/6/78	La. 2nd Circuit Court of Appeal, No. 13,549	Denial of All Parties' Applications for Rehearing
6/29/78	Louisiana Supreme Court, No. 62,560	Application for Writ of *Certiorari* filed by Frank J. Hall, *et al.*
7/5/78	Louisiana Supreme Court, No. 62,580	Application for Writ of *Certiorari* filed by Arkansas Louisiana Gas Company
9/22/78	Louisiana Supreme Court, No. 62,560	Application of Frank J. Hall, *et al.*, for Writ of *Certiorari* Granted
9/22/78	Louisiana Supreme Court, No. 62,580	Application of Arkansas Louisiana Gas Company for Writ of *Certiorari* Denied
12/14/78	Louisiana Supreme Court, No. 62,560	Oral Argument
12/18/78	United States Supreme Court, No. 78-986	Petition for a Writ of *Certiorari* to the Court of Appeal, Second Circuit, State of Louisiana, filed by Arkansas Louisiana Gas Company

Date	*Court & Case No.*	*Action*
3/5/79	Louisiana Supreme Court, No. 62,560	Opinion and Decree
4/9/79	Louisiana Supreme Court, No. 62,560	Denial of Arkansas Louisiana Gas Company's Application for Rehearing
5/17/79	District Court, Caddo Parish, LA, No. 225,699	Judgment on remand from Louisiana Supreme Court
5/23/79	District Court, Caddo Parish, LA, No. 225,699	Petition and Order for Appeal and Suspensive Appeal Bond in the amount of $4,725,000 filed by Arkansas Louisiana Gas Company
5/29/79	United States Supreme Court, No. 78-1789	Petition for a Writ of *Certiorari* to the Supreme Court of Louisiana filed by Arkansas Louisiana Gas Company
10/1/79	United States Supreme Court, No. 78-986	Arkansas Louisiana Gas Company's Petition for a Writ of *Certiorari* Denied
12/3/79	La. 2nd Circuit Court of Appeal, No. 14,012	Oral Argument
1/22/80	La. 2nd Circuit Court of Appeal, No. 14,012	Opinion and Decree
2/29/80	La. 2nd Circuit Court of Appeal, No. 14,012	Denial of Arkansas Louisiana Gas Company's Application for Rehearing
4/1/80	Louisiana Supreme Court, No. 67,225	Application for Writ of *Certiorari* filed by Arkansas Louisiana Gas Company
5/2/80	Louisiana Supreme Court, No. 67,225	Arkansas Louisiana Gas Company's Application for a Writ of *Certiorari* Denied

Date	*Court & Case No.*	*Action*
5/9/80	Louisiana Supreme Court, No. 67,225	Order filed Staying Execution of May 2, 1980, Louisiana Supreme Court Judgment, January 22, 1980, Louisiana Second Circuit Court of Appeal Judgment, and May 17, 1979, Money Judgment of the First Judicial District Court, Caddo Parish, Louisiana
5/30/80	United States Supreme Court, No. 78-986	Petition for Rehearing of the Court's Order Denying the Petition for Writ of *Certiorari* filed by Arkansas Louisiana Gas Company
5/30/80	United States Supreme Court, No. 79-1896	Petition for a Writ of *Certiorari* to the Louisiana Court of Appeal filed by Arkansas Louisiana Gas Company
7/2/80	United States Supreme Court, No. 78-986	Arkansas Louisiana Gas Company's Petition for Rehearing Denied
1/19/81	United States Supreme Court, No. 78-1789	Arkansas Louisiana Gas Company's Petition for Writ of *Certiorari* Granted

APPENDIX B

OPINIONS AND ORDERS IN THE COURT BELOW

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Opinion

For decision is defendant's exception to the jurisdiction of this Court. The plaintiffs seek damages for defendant's alleged breach of contract. Plaintiffs contend that in 1961 defendant began buying Sligo Field gas from the United States government at a price higher than was being paid to plaintiffs for their gas under the 1952 contract entered into between defendant and plaintiffs or plaintiffs' predecessors in title. Plaintiffs contend that this activated the Favored Nations clause of the contract, Section (D), which would require defendant to pay to plaintiffs a price equal to the highest price paid the government. Defendant contends that this Court does not have jurisdiction.

This Court clearly has jurisdiction under the United States Supreme Court decision in *Pan-American Petroleum Corporation vs. Superior Court of Delaware*, 81 S. Ct. 1303 (1961). There the Court held that claims arising under state law, in that case a claim sued in contract or quasi-contract, were a proper subject for a state court to exercise jurisdiction. The Court further stated that this jurisdiction was not abrogated by the Natural Gas Act. Defendant's declinatory exception is without merit and is therefore overruled.

This Court has carefully read the briefs which able counsel for plaintiffs and defendant have filed, as well as the supplemental letters and attachments. We mention this for

the purpose of making it clear to counsel that we have considered all points which have been raised, since the briefs filed by counsel will not be part of the record which will be considered by an appellate court.

July 30, 1975.

/s/ James E. Clark
Judge

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
NUMBER 225,699

FRANK J. HALL et al

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion

The plaintiffs in this case are the owners of mineral leases located within the Sligo Field, Bossier Parish, Louisiana, and they have sold all of their gas production from said leases to the defendant, Arkansas Louisiana Gas Company, since about 1939. Defendant took the gas into its pipeline and into its processing plant and the residue gas was delivered into its pipeline distribution system.

After extended negotiations a new gas sales contract between the parties was executed (see Exhibit P-1) which was dated January 11, 1952, under the terms of which plaintiffs agreed to sell their gas production from their said leases located in the Sligo Field for a period of twenty-eight years for a stated price of $0.08547 per MCF of gas (thousand cubic feet) at a pressure base of 15.025 p.s.i.a., and the defendant, Arkansas Louisiana Gas Company agreed to purchase the gas for said amount and in addition included a "Favored Nations Clause" worded as follows:

Section 8(D)

"(D) *If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered*

under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that *any such higher price* for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction." (Emphasis supplied)

In February of 1961, the defendant, Arkansas Louisiana Gas Company, as lessee, acquired a 15% interest in a mineral lease granted by the United States on its lands in the Sligo Field. (Exhibit P-45). In accordance with the requirements of the lease, the defendant and its co-owners drilled a number of producing wells on the property. The defendant did not sell its 15% of the gas produced under the lease but took it into its pipeline and into its processing

plant where the liquefiable hydrocarbons were extracted and the residue gas was delivered into its pipeline distribution system.

The oil and gas lease from the United States provided, in part, for the rights of the lessee in Section 1:

> "SECTION 1. Rights of Lessee.--That the lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor* except helium gas in or under the following-described tracts of land situated in the Barksdale Air Force Base East Reservation, Bossier Parish, Louisiana:—." (Emphasis supplied)

The lessee was to pay royalty to the United States as set forth in Section 2(d)(2):

> "2. To pay the lessor a royalty of 16⅔ per cent of the amount or *value* of production obtained and saved from the leased land. Also, to pay an additional royalty of 8⅓ per cent of the value of production until there has been paid as such additional royalty an amount equivalent to $500 an acre for the total number of acres contained in this lease at time of issuance, such number being that cited in Section 1 hereof. In computing such royalty on gasoline or other products extracted from gas or on gas remaining after extraction of such products, no allowance will be made for the cost of gathering, boosting, transportation, extraction, or processing." (Emphasis supplied)

The lease further provided that the lessor, the United States, had the option of receiving its royalties in "value" or in amount of production as provided by Section 2(d)(4):

"(4) *At the option of the lessor to pay the respective royalties herein provided for in value or in amount of production.* If paid in value such royalties shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. If paid in amount of production the respective royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and at such shipping point as may be designated by the lessor, or in the case of crude oil, in such tanks provided by the lessee as reasonably as may be required by the lessor, but in no event shall the lessee be required to hold royalty oil or other royalty products in storage beyond the last day of the calendar month next following the calendar month in which produced. The lessee shall not be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which it has no control. (Emphasis supplied)

The lessor, the United States, elected to receive its royalties in value. Section 2(d)(5) provided as follows:

"(5) *It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty* on any or all oil, gas, natural gasoline, and other products obtained from gas; *due consideration being given* to the highest price paid for a part or for a majority of production of like quality in the same field, *to the price received by the lessee,* to posted prices and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard." (Emphasis supplied)

Beginning in 1962, defendants began to pay the United States Government under the above provision of the con-

tract sums of money based upon a fraction of all gas produced on the lease with the price of gas fixed as $0.117432 per MCF until January 1, 1962, $0.130252 until January 1, 1967, and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. (Exhibit P-82). At the time these payments began in 1962, the plaintiffs were receiving $0.08797 per MCF.

The principal question in this case is whether or not the payments of money under the above quoted provisions of this contract had the effect of increasing prices under the gas sales contract of plaintiffs as set forth in the Favored Nations provision of said contract, Section 8(D).

Plaintiffs contend that the payments to the United States Government by the defendant under the terms of its lease (Exhibit P-45), but in its position as pipeline purchaser, amounted to a "Purchase from another party seller" within the meaning of plaintiffs' contract with the defendant, Section 8(D), while defendant, in effect, contends that the payments were only a payment of royalty by defendant in its position as lessee and not a purchase of gas, because the United States Government, the lessor, had no title to any gas under the terms of the contract and the amount of gas and the price assigned thereto were only to be used as a measure in figuring that "money" or "value" royalty or rent.

Louisiana has adopted the "non-ownership" theory of oil and gas, that is, that the oil and gas beneath the surface of the ground is not subject to ownership by anyone until it has reached the surface. After a long development the usual oil and gas lease has been held to provide for ownership of the *oil* produced by the lessee and lessor at the time it reaches the wellhead in the proportions set forth in the lease. The lessor is granted the option to receive his royalty as a share of the *oil* production in kind or to be delivered to the pipeline company by the lessee to the credit of the lessor. In the usual situation the lessor sells *his oil* to the pipeline company and is paid therefor by the pipeline

company although it is the lessee that actually delivers the *oil* to the pipeline for the lessor's account.

At the time the oil and gas industry in Louisiana was in its formative stages, there was less demand for natural *gas* and it was less marketable. Mineral leases often granted the lessor the same option to receive his royalty on *gas* just as was done in the case of royalty on *oil*.

The usual more recent mineral lease in use in Louisiana often makes a different provision for royalty on *gas* and only provides for the lessor to receive a fraction of the *amount* received from the *sale* of the *gas*, or a fraction of the fair value of the *gas* if the gas is used by the lessee. Regardless of whether it is oil or gas that is produced, it is usually all sold to the pipeline company at the same price and both lessee and lessor are paid their fractional part of the proceeds of the sale based on the same price rate. Ordinarily a raise in the royalty payment was accomplished by increasing the fractional part of the production due to the royalty owner, rather than a raise in the price of his share of the production.

The plaintiffs in this case have cited authorities for the proposition that such wording of a lease as to *gas* that provides for a "money" royalty or value royalty only authorizes the sale of the lessor's share of the *gas* production to the pipeline purchaser by the lessee for the lessor's account. Plaintiffs then conclude that the lessor does customarily sell *gas* to the pipeline company. On the other hand defendant has presented authorities and citations, both State and Federal, to the contrary. The cases referred to often cite the exact wording of the lease involved.

At this point is becomes important to examine the exact wording of this lease. The lease from the United States Government (Exhibit P-45) treats the royalty due to the lessor on oil and gas in principally the same fashion. It

does not differentiate between *royalty on gas* as opposed to *royalty on oil*. See the emphasized portions of the lease by the United States (Exhibit P-45), Sections 2(d)(2), 2(d)(4) and 2(d)(5). In other words the lease contemplates that the legal title to oil and gas would be the same at the time it reaches the wellhead.

The same Exhibit P-45 in speaking of the rights of lessee in Section 1 thereof as previously quoted herein states that the lessee is granted "—the exclusive right and privilege to drill for, mine, extract, remove, *and dispose of all the oil and gas deposits owned by the lessor*—". (Emphasis supplied).

Because it is well-established that in Louisiana the landowner does not own "deposits" of oil and gas in the ground, but that oil and gas is only subject to ownership when it is produced at the wellhead, it would be impossible for the lessee to "dispose" of *oil* and *gas* deposits "owned" by the lessor until they are produced at the wellhead, but at that point it is possible for the lessee to "dispose" of the production including the share of the *oil* and *gas* production "owned" by the lessor.

Although the words used in the form of the lease (Exhibit P-45) do not seem to be designed for use in a state such as Louisiana that subscribes to the "non-ownership" theory of oil and gas they are consistent with the Louisiana theory if given the above construction. In other words, the lessee is authorized to sell the lessor's share of the *oil* and *gas* production to the pipeline purchaser for the lessor's account.

Defendant argues that the decisions of the Federal Courts have held that no sale of *oil* and *gas* is involved on the part of the United States as lessor in such an instance; otherwise, the Federal Power Commission would be required to exercise jurisdiction of the sale of *gas* produced in interstate commerce, which it does not. Also, if the transaction by the United States, as lessor, amounted to a

sale of *gas* or *oil,* the United States would be required to exercise the option of taking its production in kind and would not be able to dispose of it except by public bid and sale under the applicable Federal statute. In my opinion the answer to these contentions and the testimony of the opinion of the Federal experts is the simple fact that this Court is dealing with the construction of a Louisiana contract under Louisiana law and not the construing of the lease for the purpose of a Federal statute or statutes as were the cases and opinions cited by the defendant. Although inconsistent with the Federal decisions, the inconsistency does not conflict with the Federal statutes to the extent that both cannot co-exist.

Because of the contradiction of legal authority on the technical question of whether a lessor has title of gas to sell there is an ambiguity in the use of the words "—purchase from another party seller—" as used in the contract between plaintiffs and defendant, Exhibit P-1, which cannot be gleaned from the other portions of the contract. For this reason other evidence is admissible to discover the true intention of the parties.

The defendant in this case customarily listed the lessor as a "seller" on its required division orders and required their signatures thereto. Essentially the same form was used by the defendant whether the product produced was oil, gas or condensate. Defendant argues that Section 11 of the contract provided that the plaintiffs would be paid for 8/8th of the gas and would be responsible for paying the royalty and that this provision demonstrates that the intention of the parties was that a lessor was not contemplated as a "seller"; however, the plaintiff points out that this same Section 11 goes on to grant the plaintiffs the option to require the defendant to pay the royalty and in such case the plaintiffs were obligated to furnish signed division orders to the defendant on forms provided by

the defendant and that these forms, in fact, listed the royalty owners as "sellers".

By citing the above facts, it is not my intention that this case be decided on the wording in a division order, but only to demonstrate that the evidence shows the word "seller" to have a broader usage and more general meaning than the more restricted definition plaintiff now asserts.

Defendant next argues that the United States under the lease, Exhibit P-45, was not furnished with any division order nor required to sign a division order and that this fact illustrates that the United States Government, as lessor, was not regarded as a "seller". On the other hand the evidence in this case shows that the United States does not sign a division order, but relies on the lease contract, so that the failure of the defendant to require a division order signed by the United States cannot be relied on to demonstrate the intention of the parties to P-45.

The gas purchase contract in this case between plaintiffs and defendant (Exhibit P-1) was drafted after a long negotiating process. Section 8(d) was the subject of give and take negotiations, each party giving on one point in order to gain another. The only things that this Court can conclude from the evidence of these negotiations is that Section 8(d) was not to be restricted in its application to just other formal "gas purchasing contracts" executed by buyer with other sellers of gas produced in the Sligo Field, but would apply to such a "purchase" of such gas from another party seller by means other than a formal full-fledged gas purchase contract, such as an *oral* contract. See testimony of Mr. Hetherwick, Tr. Vol. 20, p. 74, line 6 to 30. The fact that it was intended to apply to even *oral* contracts evidences an intent that it should have a broad application. It was intended to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant. In addition the intent of Section 8(d) was to protect plaintiffs against

a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long 28-year term of the contract by cutting across some of the traditional lines usually associated with such contracts.

Defendant's principal argument is that in making payment to the United States under its lease, Exhibit P-45, that it was paying royalty as lessee, *not* purchasing gas as pipeline purchaser. On the contrary, defendant was acting in a dual capacity at one and the same time. It was paying royalty as lessee *and* purchasing gas as pipeline purchaser within the meaning and intent of Section 8(d).

For all of the above reasons it is the opinion of this Court that the acceptance of gas produced from the mineral lease executed by the United States, Exhibit P-45, by the defendant as a pipeline operator and payment therefor to the United States constituted a purchase of gas from another party seller within the meaning of the contract of plaintiff, Exhibit P-1.

The defendant next argues that the contract between plaintiff and defendant, Exhibit P-1, is not comparable with the lease from the United States to the defendant, Exhibit P-45. As previously stated, the intention of the parties in the execution of Exhibit P-1 was that Section 8(d) would be broader than just applying to the purchase of gas through a formal gas purchase contract but it was intended to also apply to such things as an *oral* contract, which, in fact, evidences the intent of the parties that the coverage would be extremely broad, because it would neither contemplate that an oral contract would include all the many provisions contained in the full-fledged gas purchase contract, nor necessarily contemplate that the gas purchased be shipped in interstate commerce, since the Federal Power Commission does not recognize an oral contract for the sale and purchase of gas.

The defendant argues that the drilling obligation contained in the lease, Exhibit P-45, provides an item that

makes the two contracts incapable of comparison, but the list of items in Section 8(d) is not an exclusive listing of either pertinent factors of comparison or non-pertinent factors of comparison. It appears to the Court that since Section 8(d) specifically states that the length of the term of the contract shall not be a factor to be considered for comparison of the two contracts that the drilling obligation contained in the lease, Exhibit P-45, would be of the same type of factor and should not be considered for purposes of comparison.

As one would imagine the day-to-day administration and accounting involved in a gas purchase contract is extremely complicated. The defendant is in the business of administering these contracts and the head of its accounting department, Mr. W. W. McLeod, testified that it would be possible to compare the price of gas received by plaintiff under Exhibit P-1 and the price received by the United States under Exhibit P-45, and to compute all the pertinent factors in making the comparison and that it could have been done over the years had he been so instructed at the time. See testimony of Mr. McLeod, Vol. 10, pages 83 to 85, and Vol. 12, page 17.

The defendant in this case has made no comparison between the two prices, it having taken the position throughout that the two are not capable of comparison; however, it is my opinion that the evidence shows that the two are capable of comparison. The best information was or is in the possession of the defendant, although the sheer of volume of the documents to be considered (estimated by defendant at one time as a literal box-car load) and the length of time that has elapsed since most of them were used presents a very difficult picture as to if all are still in existence. The Court is required to act on the best information produced before it. Absolute certainty is not required.

Defendant next contends that one plaintiff, W. E. Hall, Jr., executed a contract on May 25, 1969, deleting the Favored Nations Clause from the 1952 contract for which reason he has no claim against the defendant under Section 8(d) thereof. It is my opinion that the defendant's contentions in this regard are correct and should be sustained. He executed the contract, Exhibit P-285, which deleted the Favored Nations Clause in order to be able to sell gas from a well to the defendant in order to avoid having to operate a compressor for the gas. There was no error as to the principal cause of the contract, Exhibit P-285, nor has he restored or offered to restore the benefit he received under the contract as is a pre-requisite under the Civil Code Articles 1819 and 1882.

Defendant relies on several defenses that arise from the provisions of the Natural Gas Act. The first contention is that plaintiffs cannot recover a raise in prices because plaintiff never obtained approval of the higher rate or price from the Federal Power Commission as required under the Natural Gas Act, 15 U.S.C.A. 717 et seq., adopted by Act of Congress on June 21, 1938. Defendants have cited the case of *Interstate Natural Gas Co. Inc., et al v. Mississippi River Fuel Corporation,* 55 So.2d 755; 220 La. 43, decided by the Supreme Court of the State of Louisiana in 1951. The holding of that case is that the plaintiffs, having failed to apply to the Federal Power Commission to put the increase rate into effect, cannot recover such damages from the defendant.

The plaintiffs point out that the Federal Power Commission, by general rules, has established a system which permits independent producers to obtain from the Commission a "Small Producers Certificate" which authorizes them from the effective date of such certificate to collect increased rates provided by their contract within the limits of the Commission Area Rate orders. Four of the plaintiffs herein, Frank J. Hall, Virgil J. Hall, James A. Noe

and S. G. Myers received Small Producers Certificates effective October, 1972, and would be eligible for the increased rate provided by their contract within the limits of the Commission's Area Rate orders. The remainder of the plaintiffs herein, other than Mr. W. E. Hall, Jr., above referred to, are entitled to the benefit of a Small Producers Certificate under the applicable statutes and would likewise be entitled to collect increased rates provided by their contract within the limits of the Commission's Area Rate orders. See Federal Power Commission Order No. 607 and 607-a. The evidence demonstrates that the prices paid to the United States per MCF of gas was below the maximum area rate established in these orders, which means that the area rate schedule would not actually impose any limit under the facts of this case after October, 1972, but would prevent recovery before that date.

Defendant has pled prescription of one, three and ten years. The facts of this case are that the lease from the United States, Exhibit P-45, was not even of record in Caddo Parish, Louisiana, nor was the information available giving the prices being used to compute the Government's royalty payment until plaintiffs were able to obtain the information about June 26, 1974. Suit was filed July 18, 1974.

Prescription does not run against one who is ignorant of the existence of facts that would entitle him to bring a suit, when such ignorance is not willful and does not result from negligence. Plaintiffs were not advised of the facts in this case until they succeeded in obtaining a letter dated June 25, 1974, from Mr. F. L. Stelzer which included the lease from the United States, Exhibit P-45, and the letter of establishing the price set by the Government, Exhibit P-65, and the letter in which defendant acceded thereto, Exhibit P-82. Under this state of facts prescription does not run against plaintiffs and defendant's plea of prescription is to no avail.

One of the plaintiffs herein, Frank J. Hall, was qualified as an expert in the oil and gas business, having drilled and produced wells for many years. He, or others under his direction, has prepared contracts, bought and sold gas and oil, mineral leases, royalty, minerals, managed properties, and dispersed and paid royalties on gas production. I find that he has sufficient expertise because of his experience to permit the introduction of his calculations or those made under his supervision and direction. The objection goes to the weight of the evidence and not to its admissibility.

Mr. Hall with the help of persons working at his direction prepared a calculation of the difference in prices between the two contracts in dispute here after consideration of all the pertinent factors. He then considered the volumes of gas purchased from plaintiffs and the fractional part attributable to each plaintiff's share. This calculation is the best evidence that the Court has before it and appears to be reasonable. This calculation, however, was based upon the entire period of the claim back from 1961, to December 31, 1975; whereas, the effective date of the Small Producers Certificates began in October, 1972. It is the opinion of this Court that, considering the differences in prices each year and the share attributable to each plaintiff that his itemization of the total damage due each plaintiff, except W. E. Hall, Jr., should be reduced by 68% to correctly reflect the deletion of plaintiffs' claims before October, 1972; damages for loss of depletion allowance; damages for failure to drill Section 17, and to recognize the difference in the comparisons involving raw condensate, wet gas, extracted products, manufactured products and combinations of each.

Defendant has made no claim that the fractional division of ownership between plaintiffs is in error, that the division is contrary to the records in its own division order department, or that there is any adverse claim of title against any of the interests of plaintiffs. Under the terms of its own

division orders defendant cannot equitably refuse to pay the additional sums, there being no reason to fear that the defendant would have to pay said sums to some one else.

Let there be judgment against the defendant in favor of plaintiffs in the following amounts, plus costs and interest from January 1, 1976:

Frank J. Hall	—	$135,413.44
Virgil J. Hall, widow	—	36,930.88
Carlyle W. Urban, Trustee under will of H. M. Harrell	—	202,954.56
John K. Harrell, Sr.	—	25,368.96
James E. Harrell	—	25,368.96
Elva L. Weiss, widow	—	56,853.12
National American Bank, Executor under Will of Seymour Weiss	—	56,853.12
T. F. Philyaw	—	1,187.84
W. O. Cochran	—	4,644.16
D. B. McConnell	—	42,301.76
S. G. Myers	—	41,668.80
James A. Noe	—	153,128.96
Asa Benton Allen	—	21,530.24
Elaine Allen	—	20,874.88

Let there be further judgment in favor of defendant, Arkansas Louisiana Gas Company, rejecting the demands of plaintiff, W. E. Hall, Jr., at his costs.

October 14th, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
Number 225,699

FRANK J. HALL, ET AL

v.

ARKANSAS LOUISIANA GAS COMPANY

Opinion on Defendant's Motion for New Trial Limited To Reargument and Supplement To Motion for New Trial
and
Opinion on Plaintiffs' Motion for New Trial Limited To A Rehearing and Motion for Modification of Judgment

The defendant in its motion and supplemental motion for a new trial strenuously argues that it did not breach Section 8(d) of the contract with plaintiffs.

After carefully considering the arguments made, it is still my opinion that insofar as 8(d) is concerned the effect is (and should be) the same regardless of whether P-45 was executed by the United States as lessor or had been executed by a private party as lessor; that P-45 gave the lessor, the United States, the right to exercise every incident of ownership of its royalty and when it elected to be paid in value it had the unusual right to fix the value of the production upon which its royalty payments were calculated, all of which rights are consistent with ownership of the royalty by the lessor and a purchase of gas by defendant-pipeline operator; that this Court is dealing with the construction of the Louisiana law, Section 8(d) of Exhibit P-1, which was intended to have a broad application, to apply to gas from "any" wells located in the Sligo Gas Field purchased by defendant, and with the purpose of protecting plaintiffs against a rise in the purchase price of gas that might be paid by defendant within the Sligo Field during the long twenty-eight year term of the con-

tract by cutting across some of the traditional lines usually associated with such contracts; the lease from the United States, Exhibit P-45, is to be construed in the light of such intent and purposes and, insofar as Section 8(d), in accordance with Louisiana law.

Defendant relies on the case of *Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63; 16 L.Ed 2d 368; 86 Sup.Ct. 1301, but that case specifically held that the federal common law does not govern the dealings of private parties in an oil and gas lease validly issued by the United States under the Mineral Leasing Act of 1920, and that the decision of the case would depend upon state law. The court refused to extend the application of federal law beyond the initial grant of the lease therein involved and even refused the argument "that federal law retains its initial hold on the lease until existing equities are resolved." Cases cited in that decision which did extend federal law to govern the outstanding equities existing at the time of an original grant of land were distinguished and "explained by a specific federal interest found in conflict with local law." Other cases were distinguished where there was *no* specific federal interest, because there was *no conflict with* local law. See 16 L.Ed 2d 369, at page 375. In the instant case there is also *no* specific federal interest in the construction of the contract between plaintiff and defendant and Section 8(d) thereof and, as stated in this Court's previous opinion, there *is a conflict with local law.*

The defendant here has relied on the case of *Miree v. United States,* 538 F. 2d 643, in arguing that federal law should control in the construction of the lease from the United States, P-45, insofar as its effect on Section 8(d). The facts of that case were that DeKalb County, Georgia, entered into an agreement with the Federal Aviation Administration whereby in return for a grant of money by that agency DeKalb County gave the FAA certain assurances, among which were its promises that it would operate its airport for the use and benefit of the public, main-

tain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. Thereafter, a jet aircraft crashed after ingesting birds swarming over the airport and feeding on the adjacent county garbage dump. The persons injured and representatives of the persons thus killed filed suit against DeKalb County as *third-party beneficiaries under the county's agreement under the FAA*. The United States Court of Appeals, Fifth Circuit, held in an en banc decision held that the Federal Common Law would apply, not the law of Georgia. Five judges of the court joined in a dissenting opinion.

The dissent in the above cited case sets forth principles and authorities which apply to the facts of the instant case. The facts of the instant case are at least two steps removed from those in the above cited case: (1) because plaintiffs here are not suing as third-party beneficiaries of the agreement with the United States, but are seeking to enforce an entirely Louisiana contract and provision 8(d) thereof. (2) the Federal Government is not a party to this suit and should have no particular interest in the outcome of this lawsuit. The interest of the Federal Government in the construction of Exhibit P-1 and Section 8(d) thereof is too remote to require the application of federal law, but the State of Louisiana has an interest in construing this Louisiana contract and Section 8(d) thereof in the same fashion regardless of whether the triggering mechanism be a purchase of gas from a private individual or the United States.

Defendant likewise relies on the case of *Murphy Corporation* v. *Fontenot,* 225 La. 379; 73 So.2d 180, for the proposition that the Supreme Court of the State of Louisiana has held that "the fugitive oil and gas when captured did not belong to the Federal Government but to private owners". The case did not involve an attempt to collect severance tax on the entire 8/8ths of the production from the

lease, but only that 6/8ths portion belonging to the lessees. The opinion states on Page 182 "protective measures from the drainage were sought and secured by the Government's selling exploratory rights to private purchasers and lessees who became the *owners of all* the severed minerals when they were captured, *except a 2/8th royalty* paid the U.S. Government." At Page 183 the opinion used the following language "—and the Government retained 2/8ths royalty rights in the oil and gas produced—". Actually the opinion did not address the question of the legal title of the 2/8ths production, but if so then the opinion excepts the "2/8ths royalty paid the U. S. Government" and seems contrary to defendant's contentions.

The plaintiffs in their motion contend that the case of *Interstate National Gas Company, Inc., et al v. Mississippi River Fuel Corporation*, 220 La. 43; 55 So.2d 775, was not the authority for the proposition cited by the Court in this case. The decision of the Louisiana Supreme Court there construed a gas purchase contract, the question being whether or not the contract and the amendment thereto resulted in a debt which accrued before 1938, the date the National Gas Act went into effect, or whether or not the result was a price increase that was to go into effect in 1944. The Court found that it was not an accrued debt, but rather a part of a price increase and plaintiffs had failed to apply to the Federal Power Commission as required by the National Gas Act (and even though the parties had contracted therefor), plaintiff was denied recovery. For this reason the decision does have an application to the facts of this case.

Plaintiffs also contend that the decision of this Court is contrary to that of other state judges and the federal court in this case in recognizing a defense under the National Gas Act, but my understanding of those decisions is that those courts looked to see whether or not plaintiff stated a cause of action and permitted the case to go to trial. De-

fenses based upon the National Gas Act, which are affirmative defenses, were to be pled and proved by the defense, as was done in this case.

Plaintiffs properly point out that one plaintiff, S. G. Myers, did not acquire his interest in the properties until December 1, 1972, and would not be subject to the reduction of 68% imposed by the Court. For this reason it is my opinion that Mr. Myers is entitled to his total damages of $130,215.91, but all other damages were properly calculated and are to remain the same.

The motion for new trial and supplemental motion for new trial filed by defendant is denied.

The plaintiffs' motion for new trial limited to a re-hearing and motion for modification of judgment is granted limited to re-argument and, the re-argument having been had, let there be judgment in favor of plaintiffs and against defendant all as previously granted, except that the amount of damages awarded to Sidney G. Myers is fixed at $130,215.91, instead of the amount originally stated.

December 2nd, 1977.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

NUMBER 225,699

FRANK J. HALL, ET AL

VERSUS

ARKANSAS LOUISIANA GAS COMPANY

Judgment

This case having come on regularly for trial on its legal merits on September 27, 1976, and the trial of said case having been concluded on January 14, 1977; and the case having been submitted for decision on June 20, 1977, after the completion of oral arguments and the filing of written briefs, the Court having found the law and the evidence to be in favor thereof and for reasons assigned in written Opinions dated October 14, 1977 and December 2, 1977, which have been filed in the record herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs the sums as hereinafter set forth, to wit:

FRANK J. HALL	—	$135,413.44
VIRGIL J. HALL, widow	—	36,930.88
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	—	202,954.56
JOHN K. HARRELL, SR.	—	25,368.96
JAMES E. HARRELL	—	25,368.96
ELVA L. WEISS, widow	—	56,853.12

NATIONAL AMERICAN BANK, Executor under Will of SEYMOUR WEISS	—	56,853.12
T. F. PHILYAW	—	1,187.84
W. O. COCHRAN	—	4,644.16
D. B. MCCONNELL	—	42,301.76
JAMES A. NOE, JR. and C. T. MUNHOLLAND, Testamentary Executors under Last Wills of Mr. and Mrs. JAMES A. NOE	—	153,128.96
S. G. MYERS	—	130,215.91
ASA BENTON ALLEN	—	21,530.24
ELAINE ALLEN	—	20,874.88

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above and foregoing Plaintiffs are awarded legal interest on the above and foregoing sums from January 1, 1976, until paid and for all costs of this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Defendant, ARKANSAS LOUISIANA GAS COMPANY, rejecting the demands of the Plaintiff, W. E. HALL, JR., at his cost.

JUDGMENT RENDERED herein by virtue of written Opinions dated October 14, 1977 and December 2, 1977, respectively, which are filed in the record of this proceeding.

JUDGMENT READ AND SIGNED on December 5, 1977, at Shreveport, Louisiana.

/s/ C. J. BOLIN, JR.
C. J. Bolin, Jr.
District Judge

No. 13,549

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

May 1, 1978

FRANK J. HALL, ET AL, *Plaintiffs-Appellants*

v.

ARKANSAS-LOUISIANA GAS COMPANY, *Defendant-Appellant*

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Honorable C. J. Bolin, Jr., Judge

* * * * *

WIENER, WEISS, MADISON & HOWELL by James Fleet Howell	*Attorney for Plaintiffs-Appellants*
BLANCHARD, WALKER, O'QUIN & ROBERTS by Robert Roberts, Jr.	*Attorneys for Defendant-Appellant*

* * * * *

Before: PRICE, MARVIN, JONES, JJ.

By Price, J.

Plaintiffs seek damages for an alleged breach of contract by defendant for failing to escalate the price of gas purchased from them in accord with a price adjustment provision contained in a long-term gas purchase contract.

Plaintiffs are either independent producers or owners of various mineral interests under numerous leases producing natural gas in the Sligo Gas Field of Bossier Parish. Defendant, Arkansas Louisiana Gas Company (Arkla) is a large integrated gas utility company, which engages in exploration, production, transmission, purchase, and sale of natural gas and its by-products. Arkla has for many years been a major purchaser of gas in the Sligo Field.

The gas purchase contract forming the basis for this litigation was executed in 1952 between Arkla and several independent producers pursuant to a lengthy renegotiation of an existing contract which had been in effect since 1937, and which would have expired in 1954. Although all of the multiple plaintiffs herein were not original parties to the 1952 contract, they have subsequently become parties subject to the agreement by amendment or by operation of law. The 1952 agreement obligated plaintiffs to sell all of the gas produced or owned by them in the Sligo Field to Arkla for a period of twenty-eight years and provided for a fixed schedule of prices per MCF to be paid for raw gas throughout the period of the contract. The agreement further contained a price adjustment provision referred to in the contract as a "Favored Nations Clause," providing:

> (D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact "higher" than the price provision of this contract, the inquiry shall not be limited to the actual prices stipu-

lated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

In February 1961 Arkla acquired, as lessee, a fifteen percent interest in an oil and gas lease granted by the United States on approximately 2,400 acres of land owned by it in the Sligo Field. Arkla participated with its co-lessees in drilling for and producing gas in substantial amounts from this leased acreage. Arkla has taken its fifteen percent share of the gas produced into its own processing plant in the Sligo Field and disposed of it through its own distribution system including transmission through an interstate pipeline. The lease from the United States stipulated a royalty to be paid by the lessees of a percentage of the oil or gas production obtained or, at the option of the United States, a payment in money by the lessees of the fair market value attributed to its percentage of production. The government has continuously elected to be paid a "value royalty," and in accord with the right reserved by it to have

the Secretary of Interior establish the reasonable minimum value of gas for computation of royalty due, the price determined and ultimately acceded to by Arkla was and has continued to be in excess of that being paid plaintiffs under the 1952 contract.

Plaintiffs brought this action in October 1974 alleging that the payment of the higher price to the United States by Arkla beginning in 1961 activated the provisions of the Favored Nations clause of the 1952 contract and obligated Arkla to increase the purchase price paid plaintiffs commensurate with the price paid the government.

Plaintiffs seek compensatory damages and an accounting from Arkla alleging that it was in bad faith in intentionally concealing from them for fourteen years that a higher price was being paid for gas to the United States.

Arkla filed appropriate responsive pleadings questioning the jurisdiction of the state court alleging that the gas purchases in question have always been subject to the provisions of the Natural Gas Act, and solely within the jurisdiction of the Federal Power Commission (FPC), which has since been superseded by the Federal Energy Regulatory Commission (FERC). Arkla's attempt to have the case removed to the Federal District Court on that basis was denied.

In answer to the original and several amended pleadings of plaintiffs, Arkla denied it had triggered the Favored Nations clause of the 1952 contract by payment of an amount for gas to the United States which exceeded that being paid plaintiffs since the payment to the United States was solely a "rental royalty" and not a purchase of gas from another "party seller" as required for activation of the price adjustment provision.

An exception of no cause of action was filed by Arkla against the claim of one of plaintiffs, W. E. Hall, Jr., on the basis that he executed an amendment to the contract

dated May 25, 1969, which deleted the benefit of the Favored Nations clause as to him. Hall through responsive pleadings contends the amendment by him was ineffective because it was executed in error as he had no knowledge at the time that Arkla had previously breached the contract by paying the higher price to the United States.

After a very lengthy trial on the merits,[1] the district court sustained the exception of no cause of action as to the claims of W. E. Hall, Jr., and dismissed his demands. The court rendered judgment for all other plaintiffs as follows:

Frank J. Hall	$135,413.44
Virgil J. Hall	36,930.88
Carlyle W. Urban, Trustee under Will of H. M. Harrell	202,954.56
John K. Harrell, Sr.	25,368.96
James E. Harrell	25,368.96
Elva L. Weiss	56,853.12
National American Bank, Executor under Will of Seymour Weiss	56,853.12
T. F. Philyaw	1,187.84
W. O. Cochran	4,644.16
D. B. McConnell	42,301.76
James A. Noe, Jr. and C. T. Munholland, Testamentary Executors under Last Wills of Mr. and Mrs. James A. Noe	153,128.96
S. G. Myers	130,215.91
Asa Benton Allen	21,530.24
Elaine Allen	20,874.88

There are several issues on appeal which can be generally categorized as follows: (1) whether the Federal Energy

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[1] The pleadings and testimony consume twenty-six volumes containing 4,987 pages. There are additionally over 360 exhibits offered by plaintiff and over 80 offered by defendant.

Regulatory Commission has the sole and exclusive subject matter jurisdiction; (2) whether the Favored Nations clause was activated when defendant paid value royalty at a higher price to the United States than it paid for gas purchases to plaintiffs; (3) whether W. E. Hall, Jr., validly waived his interest in the Favored Nations clause when he signed an amended contract in 1969; and (4) whether the award of damages by the trial court was correct.

I. JURISDICTION

The threshold issue on appeal is whether the trial court had proper subject matter jurisdiction to entertain this suit. Defendant contends the trial court lacked the power and authority to determine the rate at which natural gas was or is sold in interstate commerce since the rate-making function is vested solely and exclusively in the FERC by the Natural Gas Act. Defendant further contends that the FERC has primary jurisdiction to determine the contractual issue of whether the Favored Nations clause of the 1952 contract was activated by its payment of value royalty to the United States. Neither of these contentions can be maintained. Defendant's initial argument is in error because the relief sought is not that of a rate increase, but is instead a claim for damages arising under state contract law. Although the state court must adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages, it is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956). The act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. *Cities Service Gas Company v. Federal Power Commission*, 255 F.2d 860, *cert. den.* 358 U.S. 837, 79 S.Ct. 61 (1958); *Skelly Oil Co. v. Federal Power Commission*,

532 F.2d 177 (1976); *Phillips Petroleum Co. v. Federal Power Commission,* 349 F.2d 535 (1965). A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved. *Pan American Petro. Corp. v. Superior Court of Del.,* 366 U.S. 656, 81 S.Ct. 1303 (1961).

Defendant's contention that the FERC has primary administrative jurisdiction to decide this contract dispute is also in error. In recent years the doctrine of primary administrative jurisdiction has been refined to apply to claims involving the special competence and expertise of an administrative body. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.,* 341 U.S. 246, 71 S.Ct. 692 (1951); *Best v. Humboldt Placer Mining Company,* 371 U.S. 334, 83 S.Ct. 379 (1963); *United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 77 S.Ct. 161 (1956). State courts do have jurisdiction to determine matters of contract law not within the specific technical expertise of the FERC. *Pan American Petro Corp. v. Superior Court of Del., supra.* The major issue in the case before us is one of construing the provisions of a contract and the intentions of the parties at the time of the execution of the contract. Such a determination does not require the specific technical expertise of the FERC. Although the FERC may have original jurisdiction in this case, it does not have exclusive original jurisdiction, but rather shares concurrent original jurisdiction with the state court.

II. Activation of the Favored Nations Clause

Plaintiffs contend payments made to the United States by defendant in its dual capacity as lessee and pipe-line purchaser are tantamount to a "purchase from another party seller," as this term was intended in the price adjustment clause of their 1952 gas sales contract with defendant. Defendant contends the payments were royalty or rent being paid in its position of lessee and not a purchase because the United States had no title to any gas produced

under the lease, it having continuously elected to accept a value royalty on the gas produced.

We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp. v. Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan v. State Gravel Co.*, 103 So. 526 (La. 1925); *Board of Com'rs. of Caddo Levee Dist. v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (La. 1929); *Melancon v. Texas Company*, 230 La. 593, 89 So. 2d 135 (1956). *Mobil Oil Corporation v. Federal Power Commission*, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413 (1972).

We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term "purchase from another party seller" relied on by defendant under the circumstances shown in this instance.

The evidence shows that during the lengthy negotiations between defendant and the principal plaintiffs in 1952, defendant's prime objective in renegotiating the preexisting contract was to commit the plaintiffs to a long-term contract. As an inducement for a twenty-eight-year-term the officials of the defendant corporation offered to include a Favored Nations clause. The request by plaintiffs to have the clause pivot on the highest market price being paid by *anyone* in the field was rejected by defendant.

The handwritten notations made at that time by the defendant's attorney who prepared the final draft of the agreement show that his instructions from the official of defendant handling the negotiations were to prepare a price adjustment clause based on "highest price we pay for gas in the Sligo Field." Thereafter, agreement on the subject clause was reached which tied it to the highest price being paid by *defendant* in the Sligo Field.

There is no evidence suggesting the description of the contracting parties as "Buyer" and "party sellers" was in-

tended to have any restrictive legal meaning and the terms were apparently standard phrases contained in a Favored Nations clause of another contract used as a model by the attorney drafting the agreement. Indicative of the fact that little thought was given to these terms having any significant restrictive effect on the broad application of the clause is the absence of a definition of the words "Buyer" and "party seller" within the agreement. Although defendant strenuously urges that the terms "Buyer," "seller," and "purchase" as used in the Favored Nations Clause has a restrictive legal meaning and limits the applicability of the clause to "sales" of gas, defendant's actions subsequent to execution of the contract show a tendency on its part to use sales terminology in a very broad manner to also include royalty interests in the preparation of division orders and the payment of royalty to lessors from a bank account styled "Gas Purchase Account."

The general rule of contract interpretation concerning a Favored Nations clause is that "in order to give effect to the intention of the parties the Court must consider the circumstances surrounding the making of the contract, its subject, and the situation and relation of the parties at the time of its making; *and the construction placed upon the contract by the parties to it as reflected by their words and acts is entitled to great, if not controlling influence in ascertaining the parties' understanding of its terms.*" [emphasis added] *Louisiana-Nevada Transit Co. v. Woods,* 393 F. Supp. 177 (1975).

The basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract. *Eastern Petroleum Company v. Kerr-McGee Corporation,* 447 F.2d 569 (1971); *Louisiana-Nevada Transit Co. v. Woods, supra.* As it is intended for the protection of the seller, the clause should be broadly construed to effectively carry out this purpose. Therefore, to exclude the substan-

tial amounts paid to the government by defendant as having any bearing on the price being paid for gas by defendant in this field because of a technical semantic classification of the payment as being rent royalty would render the protection intended to be afforded plaintiffs by a price adjustment clause meaningless.

The factors affecting our decision on this issue are analogous to those presented in *Eastern Petroleum Company v Kerr-McGee Corporation, supra,* in which the court found a payment of royalty to the state of Arizona under a lease of public lands to activate a Favored Nations clause in a contract providing that payment for gas "shall never be less than the price paid by Buyer to other sellers of helium-bearing gas from leases or lands in the same general area." The defendant pipe-line purchaser in that case contended the payment of royalties to the state was not a "price" paid to another "seller" within the meaning of the contract as the gas was "owned" by the lessee at the time it was reduced to possession. The court found it unnecessary to decide whether the payment under the lease to the state was a purchase of gas or royalty as either classification was within the purpose and intent of the price adjustment clause of the contract before it. As we are unaware of any appellate decisions in this state concerning the interpretation of such unusual contractual provisions, we are constrained to follow the federal jurisprudence in resolving this question.

For the foregoing reasons, we conclude the trial court was correct in holding that the payment by defendant for gas produced under the lease from the United States was within the scope of the price adjustment clause of plaintiffs' contract.

III. Waiver of Favored Nations Clause By W. E. Hall, Jr.

On May 25, 1969, W. E. Hall, Jr., one of the numerous plaintiffs herein, executed an amendment to the 1952 gas purchase contract wherein he deleted his interest in the Favored Nations clause. Defendant asserts plaintiff's waiver as an affirmative defense against his claim for damages arising under the price adjustment clause. Plaintiff contends the waiver was ineffective because he executed the amendment under an error of fact induced by defendant's misrepresentations and concealment of the true facts causing him to believe the price adjustment clause had not been activated. Plaintiff contends he would not have deleted the clause had he known of the higher prices being paid by Arkla to the government. However, plaintiff's testimony reveals that in 1969 Hall had an interest in a well under contract to Texas Gas Producing Company with gas produced therefrom being sold to the latter. At that time the well had nearly depleted, and the pressures were dropping. In order to keep from having to cap the well, Hall contacted defendant who agreed to take over the well and use its pipe lines wherein the pressures would be lower, thus allowing the well to keep producing. In order to contract with defendant, plaintiff had to execute an amendment deleting the Favored Nations clause to comply with the FPC's more recent regulations prohibiting the inclusion of such a clause in a gas purchase contract. By using defendant's pipe lines, Hall was able to sell the gas without having to compress it. He testified that the main reason for executing the contract was to keep selling the gas without having to buy and operate a compressor to compress the gas.

The Louisiana Civil Code articles dealing with error of fact (C.C. Arts. 1820-1845) provide that a contract will not be considered invalid unless there was error as to the "principal cause," or "motive," for making the contract. C.C. Art. 1825. In this case the principal motive for W. E.

Hall, Jr.'s signing the contract was to continue selling gas without the expense and time of having to purchase and operate a compressor. Therefore, as correctly found by the trial court, there was no legal error of fact upon which this plaintiff can rely to vitiate the waiver.

IV. Damages

The first issue presented in determining the correctness of the award made to plaintiffs is the effect the "filed rate doctrine" of the Natural Gas Act has on the rights of plaintiffs to recover damages. Sections 4(c) and 4(d) of the act require a seller of natural gas to file a proposed rate increase with the FPC for its approval before such an increase can be effective. The only rate schedule ever filed by plaintiffs with the FPC in this instance was the original gas purchase contract in 1952. The FPC regulations, § 157.50(c), provide an exception to the foregoing rule in regard to a "small producer" as defined in the regulation, who has obtained a certificate from the commission exempting him from having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the commission. Several of the plaintiffs obtained certificates as small producers in October 1972, and the certificates issued to those parties were made effective to all plaintiffs in this action by the order of the FPC.

The trial court found that the plaintiffs were precluded by the Natural Gas Act from recovering damages, which are measured by a standard related indirectly to a retroactive price increase, except for the period subsequent to the issuance of the small producer certificates in October 1972. This holding is in accord with the jurisprudence construing the effect of this statute. *Interstate Natural Gas Co., Inc. v. Mississippi River Fuel Corporation,* 220 La. 43, 55 So. 2d 775 (1951); *Ashland Oil & Refining Co. v. Federal Power Commission,* 421 F.2d 17 (1970); *Socony Mobile Oil Co. v. Brooklyn Union Gas Co.,* 299 F.2d 692 (1962).

Although plaintiffs claim quantum based on an amount commensurate with the difference between the price they received and that which they would have received had they been granted a price increase in 1962, they contend their suit is for damages and not for a retroactive price increase, and is therefore not affected by the Natural Gas Act.

Plaintiffs' alternative theory of recovery is that they should recover for damages caused by the fraudulent concealment by defendant of the fact it was paying a higher price to the United States for gas which prevented them from timely filing for a change in rate schedule with the FPC.

Neither of these positions is tenable. The action for damages to be successful necessarily assumes a price increase would have been granted by the FPC. That such approval would have been granted by the commission is highly speculative and cannot serve as a basis for an award of damages. See *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 102 F. Supp. 685 (1952).

The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation.

The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiffs' contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. Defendant did not make any disclosure to plaintiffs at that time or subsequently which would have allowed plaintiffs the opportunity to seek a determination before an appropriate tribunal. In early 1974 when inquiries were made by plaintiffs, the officials of Arkla were uncooperative and evasive in answer to questions concerning the possible purchase of gas from the United States. Although

this failure to inform and later evasiveness on the part of defendant was not commendable, it nevertheless does not prove fraudulent concealment. A party alleging fraud has the burden of establishing it by more than a mere preponderance of the evidence. The conclusive proof required must be by clear and convincing legal evidence. *Placid Oil Co. v. Taylor*, 345 So. 2d 254 (La. App. 3rd Cir. 1977); *Capital Bank & Trust Co. v. Core*, 343 So. 2d 284 (La. App. 1st Cir. 1977); and *Jackson v. Fontenot Building Inc.*, 314 So. 2d 516 (La. App. 1st Cir. 1975). For these reasons plaintiffs cannot be awarded damages bearing any relationship to an increase in gas prices for the period prior to October 1972.

Defendant primarily complains on appeal of the admissibility and probative value of the plaintiffs' evidence to sustain any award of damages. The evidence relied on by plaintiffs to prove their damages for breach of contract was the testimony of Frank J. Hall, a plaintiff having substantial gas holdings in Sligo that are subject to the contract. The evidence shows Hall to be a knowledgeable oil and gas operator with many years of experience in the exploration for, production, and sale of natural gas. Hall gathered all of the pertinent data necessary to calculate the damages to which plaintiffs claim they are entitled for the entire period from September 1961 through December 1975. Based on the data obtained, Hall, with the assistance of his accountant who is also a plaintiff in this suit, prepared schedules to reflect a comparison in the price being paid by Arkla to plaintiffs with that being paid to the United States for each year during this fourteen-year period. Under the instructions and supervision of Hall, the accountant further prepared summaries which related the differential in the price of gas to the volumes sold by plaintiffs to defendant for the period. Built into these summaries are the adjusting factors which Hall considered necessary to render the prices comparable. The summaries were further extended

to calculate and show the accrual of the legal rate of interest on the sums claimed during the period.

Defendant attacks the admissibility of the above described evidence contending that the schedules and summaries were made from information that has not been offered in evidence. There is a well recognized rule that summaries of voluminous material or documents may be introduced in evidence provided the opposing party has equal access to the material from which the summaries were prepared. Wigmore, "Evidence," (1972) Vol. IV., § 1230, at page 535, *Northern Pac. Ry. Co. v. Keyes*, 91 F. 47 (1898); *Sam Macri & Sons, Inc. v. U.S.A.*, 313 F.2d 119 (1963); *Midcontinent Broadcasting Company v. North Central Airlines, Inc.*, 471 F.2d 357 (1973). In the instant case defendant was in the superior position and had full access to all data on which Hall relied. A substantial part of the information gathered by Hall was from records of defendant's accounting department which were inspected under discovery procedure. Hall utilized division orders prepared by defendant to determine percentages of ownership in each drilling unit over the period in question. To establish production quantities of raw gas and liquid hydrocarbons, he relied partially on records in his own office and on information obtained from the State Department of Conservation. Defendant had equal access to all such data. Although there are others who would have better qualifications because of specialized training to make such an analysis, Hall has exhibited a sufficient familiarity with the underlying principles of gas pricing and methods of accounting to allow the admissibility into evidence of his testimony and the summaries prepared under his supervision for whatever weight they may have.

Defendant also attacks the weight to be given the calculations made by Hall and his accountant as it contends they are self-serving. While this evidence is to some extent self-serving, this reason alone is not sufficient to reject it in the

absence of any rebuttal evidence showing that the evidence as a whole was unreliable and not prepared with any degree of objectivity.

Defendant questions the acceptance of the summaries also on the basis that Hall has calculated plaintiffs' damages by a determination of the difference between gas prices paid to the United States and the plaintiffs and by assuming the plaintiffs' contract was revised to provide for processing of raw gas at defendant's plant and payment of the entire value of extracted liquids to them and assuming that all condensate was processed by defendant free of charge and the proceeds paid to them. Defendant contends these adjustments made by Hall are improper and give plaintiffs advantages which were never intended by the "pertinent factors" adjustments provided in the Favored Nations clause of the contract. The comparability provisions of the Favored Nations clause of this agreement provides:

> . . . provided that in determining whether a given price is in fact "higher" than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts.

A literal reading of this provision requires the interpretation that all pertinent factors necessary to properly

equate the price of gas shall be given consideration and those specified are illustrative only. The only factor to be excluded is the length of the contract term. We find the adjustments made by Hall in the summaries were within the purview of this provision.

Plaintiffs also calculated two other items of compensatory damages claimed by all or some of the plaintiffs. The first relates to losses occurring because of income tax advantages which would have inured to all plaintiffs under depletion allowances had they received the increases in price during the years they were due rather than in a lump amount under a court award. The second refers to losses to several of the plaintiffs who contend they would have drilled an additional well in the field had they been advised timely by defendant of the facts which would have enabled them to have obtained a price increase in 1961. Both the damages for loss of the depletion allowance and the loss arising from the lack of knowledge concerning the increased gas prices are consequential damages which cannot be recoverable for the breach of an obligation to pay money. La. C.C. Art. 1935.

Defendant next complains that the method of the trial court in arriving at the award of damages was erroneous. The trial court accepted the summaries prepared by Hall as competent evidence on which to award damages, but was confronted with the problem that the summaries were prepared for the total period from September 1961 through December 1975. In order to limit plaintiffs' award for the period of October 1972 through December 1975, the court reduced the total damages reflected by Hall's summary by a percentage of sixty-eight percent.

Defendant contends this method is erroneous as it gives no consideration to the differences in the actual volumes of gas produced and sold in the period for which damages are allowed and assumes that they have remained constant over the entire period since 1961. Further, defendant shows

Hall's summary contains a calculation of interest for the entire period of fourteen years, and therefore, the method used by the court allows recovery of interest on sums not recoverable. Defendant also illustrates that the procedure followed by the court does not compensate each plaintiff equally for the volume of gas sold by him during the allowable period.

We recognize that during the presentation of evidence on damages, the trial court suggested to the parties on several occasions the possibility of an appointment of an expert to assist the court in this very complex matter. As this suggestion was not pursued, the court had no means at hand to accurately reduce the summaries in evidence to the period for which plaintiffs were entitled to damages, and therefore, resorted to the percentage of allocation utilized. Plaintiffs are only entitled to damages representing a difference between the price paid by the defendant to the United States and the price paid to them, after applying the adjustments for pertinent factors, for the period from October 1, 1972, through December 31, 1975. They are additionally entitled to interest at the legal rate of seven percent on the increased amount owed to them as it accrued each month during this period. La. C.C. Arts. 1938 and 2553(3).

We must agree that the method used by the trial court does not achieve this result. These calculations cannot correctly and accurately be made by this court from the record before us. Under La. C.C.P. Art. 2164 this court may render any judgment which is just, legal, and proper, including the power to remand for a new trial in the interest of justice. See *Guilott v. Guilott*, 326 So. 2d 551 (La. App. 3rd Cir. 1976).

While we are reluctant to protract this litigation, we find it necessary to remand the case in the interest of justice to both parties for the limited purpose of a recalculation of

the damages and the interest to be allowed each plaintiff in accord with the views expressed herein.

The district court may in its discretion appoint an expert in the field of oil and gas accounting to perform the necessary calculations based insofar as possible on the evidence already in the record in this matter. The court may take whatever additional evidence that is found necessary to calculate damages in accord with these views.

For the foregoing reasons, the judgment is set aside, and the case is remanded for a new trial restricted to the assessment of damages. Costs of this appeal are assessed equally to plaintiffs and defendant. Assessment of all other costs shall await final determination of this cause.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Office of the Clerk, Shreveport, Louisiana. June 6, 1978

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Plaintiffs-Appellants and Defendant-Appellant have this day been En Banc. Denied.

FRANK J. HALL, et al

versus

ARKANSAS LOUISIANA GAS CO.

Docket No. 13,549

Sincerely,
HAROLD L. BOOTH
Clerk of Court

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

v.

ARKANSAS LOUISIANA GAS COMPANY

No. 62,560

In re: Frank J. Hall, et al applying for Certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Caddo

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Writ granted.

PFC
JWS
ATJR
JAD
WFM
JLD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans

September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk of Court

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

September 22, 1978

FRANK J. HALL, ET AL

VS.

ARKANSAS-LOUISIANA GAS COMPANY

No. 62,580

In re: Arkansas Louisiana Gas Company, applying for Certiorari, or Writ of Review, to the Court of Appeal, Second Circuit, Parish of Caddo.

Writ denied.

PFC
FWS
ATJR
JAD
WFM
JLD

SANDERS, C.J., would grant this application, so that it can be considered along with No. 62,560, which has been granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 22, 1978

/s/ FRANS J. LA BRANCHE, JR.
Clerk

SUPREME COURT OF LOUISIANA

No. 62,560

FRANK J. HALL, ET AL

v.

ARKANSAS-LOUISIANA GAS COMPANY

ON WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEAL
PARISH OF CADDO, STATE OF LOUISIANA

March 5, 1979

MARCUS, Justice*

Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract.

Planitiffs, in their original and amended and supplemental petitions, alleged that on January 11, 1952, they, or their respective ancestors in title, entered into a gas purchase agreement with defendant wherein plaintiffs agreed to sell to defendant their natural gas, and the natural gas owned by their respective lessors, produced from certain described lands in the Sligo Gas Field, Bossier Parish, Louisiana. This agreement, by its terms, was to continue in effect from January 11, 1952, through June 1, 1980. Under the terms and provisions of this agreement, defendant was to pay a fixed schedule of prices for the natural gas delivered to it from plaintiffs. This agreement also contained a price adjustment provision, com-

* Chief Judge William A. Culpepper participated in this decision as Associate Justice Ad Hoc sitting in the place of Chief Justice Sanders, retired.

monly referred to as a favored nations clause, which provided in pertinent part:

> If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract. . . . It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

Plaintiffs alleged that since January 11, 1952, they and their respective lessors, have sold substantial quantities of natural gas produced from wells in the Sligo Gas Field to defendant at the prices stipulated in the fixed schedule of prices as contained in the agreement. Plaintiffs further alleged that from September 1961 until the date of the institution of this action, defendant purchased from another party seller (the United States government) natural gas produced from wells located in the Sligo Gas Field at a higher price (including prices paid for both the residue or dry gas and the liquid hydrocarbons or plant products extracted from the United States government's gas delivered to defendant's pipeline system) than it was paying to plaintiffs pursuant to the January 11, 1952 gas purchase agreement for plaintiff's dry or residue gas and liquid hydrocarbons or plant products extracted from plaintiff's gas and delivered into defendant's pipeline system. By

paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field, plaintiffs contended that defendant activated the provisions of the favored nations clause and legally obligated itself to advise plaintiffs of these facts and pay plaintiffs the higher price being paid to another party seller (the United States government) for natural gas produced from wells in the Sligo Gas Field. Plaintiffs contended that they were entitled to such higher price from the first time defendant paid such higher price to another party seller. Plaintiffs averred that defendant had at no time during the existence of the January 11, 1952 agreement informed plaintiffs, or any of their representatives, of the fact that it had been paying a higher price to another party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs thus argued that defendant had breached the favored nations clause of their agreement by failing to pay plaintiffs a price equal to the highest price paid by defendant to any other party seller for natural gas produced from wells in the Sligo Gas Field. Plaintiffs sought damages equal to the difference between the price paid to them and the highest price paid by defendant to any other party seller for such natural gas during the period of time that defendant purchased natural gas from the United States government.

In its answer, defendant admitted that it purchased substantial quantities of natural gas from plaintiffs pursuant to the January 11, 1952 gas purchase agreement. Defendant, however, averred that it had not at any time paid anyone a price higher than that paid plaintiffs for natural gas purchased from the Sligo Gas Field and it specifically denied that it was purchasing any natural gas produced from the Sligo Gas Field from the United States government. Further answering the petition, defendant alleged that the only contract between it and the United States government relating to the production of natural gas from the Sligo Gas Field was an oil, gas, and mineral lease

dated January 23, 1961, and executed by the United States Department of the Interior in favor of Union Producing Co. and covering land situated in the Sligo Gas Field. Defendant averred that it acquired an undivided 15% interest in this lease by virtue of an assignment from Union Producing Co. on January 30, 1961, and argued that this lease did not constitute an offer or contract to sell natural gas, but, rather, granted defendant only the right to explore for, remove, and dispose of oil and gas. Hence, defendant contended, the only payments made by it to the United States government were the payments of royalty (based on the value of the natural gas and other products extracted from the natural gas) as provided in the lease and not payments for the purchase of natural gas from the United States government.

By supplemental and amended answer, defendant further alleged that the Federal Power Commission, pursuant to the provisions of the Natural Gas Act (15 U.S.C. § 717 a-w) had sole jurisdiction over the sale of natural gas by plaintiffs to defendant under the January 11, 1952 gas purchase agreement upon which this action was founded. Defendant contended that, pursuant to 15 U.S.C. § 717c (d),[1] plaintiffs were required to file and give notice of any

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[1] 15 U.S.C. § 717c(d) provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty day's notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

proposed increase of rates, including any contractually-authorized rate increase, above the authorized initial rate and that, as plaintiffs had failed to file for such rate increase allegedly allowable under the favored nations clause, they were not lawfully authorized to collect the increased rate in this action. In addition, defendant averred that one of the named plaintiffs, W. E. Hall, Jr., executed, on May 25, 1969, an amendment to the gas purchase agreement of January 11, 1952, which deleted the favored nations clause from his contract with defendant. In view of this amendment, defendant contended that W. E. Hall, Jr. had no cause or right of action for any claim against defendant arising on or after May 25, 1969.

The trial court first held that payments made by defendant to the United States government under the terms of the lease constituted a "purchase from another party seller" within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States government and the price paid plaintiffs) for the period subsequent to the issuance of small producer certificates to plaintiffs in October 1972. The court reasoned that plaintiffs could not recover a "raise in prices" for the period prior to October 1972 because they had never obtained approval of a higher rate or price from the Federal Power Commission as required by 15 U.S.C. § 717c-d. The trial judge noted, however, that the regulations of the Commission (18 C.F.R. § 157.40) provide

that a "small producer," as defined in the regulations, may obtain a small producer certificate from the Commission exempting it from the necessity of filing a rate schedule in order to obtain contractually-authorized rate increases if the rate increase does not exceed the ceiling rate set by the Commission. The trial judge determined that plaintiffs had obtained such "small producer certificates" in October 1972 and concluded that plaintiffs would be entitled to a recovery of damages for the period from October 1972 through December 1975. The trial court then determined that, because W. E. Hall, Jr. amended his contract with defendant on May 25 1969, and deleted the favored nations clause from his contract, he had no claim against defendant under the favored nations clause subsequent to May 25, 1969, and would be entitled to no recovery of damages.

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors) only for the period from October 1, 1972 through December 31, 1975.[2] In addition, the court of appeal held that W. E. Hall, Jr. had waived any claim for damages against defendant for the period subsequent to May 25, 1969, by entering into an amended contract with defendant on that date which deleted the favored nations clause from his contract.[3]

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[2] The court of appeal found that the calculations used by the trial judge to determine the amount of damages for the period from October 1, 1972 through December 31, 1975 were based on plaintiffs' calculations representing the entire period of the breach (September 1961 through December 31, 1975). The appellate court thus ordered the case remanded for a new trial restricted to the assessment of damages.

[3] 359 So. 2d 255 (La. App. 2d Cir. 1978).

We denied defendant's application for a writ to review the correctness of the court of appeal's decision.[4] However, on application of plaintiffs, we granted a writ limited to a consideration of whether the court of appeal was correct in denying an award of damages to plaintiffs for the period of defendant's breach prior to October 1972 and whether it was correct in holding that W. E. Hall, Jr. "waived" any claim for damages against defendant by entering into an amended contract on May 25, 1969, which deleted the favored nations clause from his contract.[5]

We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas

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[4] 362 So. 2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So. 2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us.

[5] 362 So. 2d 798 (La. 1978).

Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). The first issue presented for our resolution is a determination of whether plaintiffs are entitled to a recovery of the difference between such prices for the entire period of defendant's breach of the contract (September 1961 through December 31, 1975) or whether plaintiffs are precluded from a recovery of damages representing the period prior to October 1972.

Unless the Federal Power Commission otherwise orders, no change shall be made by any natural gas company in any rate received by it for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or contract relating thereto, except after thirty days' notice to the Commission and to the public. 15 U.S.C. § 717c(a) & (d). Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when such changes will go into effect. *Id.* (d). A "small producer" (as defined by the Commission's regulations) may obtain a "small producer certificate" exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40. Several of the plaintiffs obtained "small producer certificates" in October 1972, and the certificates

issued to those parties were made effective as to all plaintiffs by order of the Commission. It is not disputed by the parties before us that the only rate schedule ever filed by plaintiffs with the Commission was the original gas purchase contract entered into on January 11, 1952. The trial court and court of appeal denied plaintiffs an award of damages arising from defendant's breach of contract for the period of time (*i.e.*, prior to October 1972) during which plaintiffs were required to file new rate schedules with the Commssion reflecting their entitlement under the contract, to a higher price for their natural gas sold to defendant.

La. Civ. Code art., 2040 provides:

> The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it.

It is difficult to attach a precise meaning to the rule as it is literally set forth in the text of article 2040. This court, however, has long recognized that the English translation of this provision from the French articles as written in the Louisiana Civil Codes of 1825 (article 2035) and 1808 (article 78) is inaccurate and the French text has always prevailed in decisions of this court. *See* George W. Garig Transfer v. Harris, 226 La. 117, 75 So. 2d 28 (1954); Southport Mill v. Friedrichs, 171 La. 786, 132 So. 346 (1931); Morrison v. Minton, 163 La. 1065, 113 So. 456 (1927); Walls v. Smith, 3 La. 498 (1832) (dissenting opinion). Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. George W. Garig Transfer v. Harris, *supra;* Southport Mill v. Friedrichs, *supra;* Morrison v. Minton, *supra.* This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one

should not be able to take advantage of his own wrongful act. *See* Cox v. Department of Highways, 252 La. 22, 209 So. 2d 9 (1962).

The favored nations clause of the contract entered into between plaintiffs and defendant provided that, if defendant purchased from another party seller gas produced from any wells located in the Sligo Gas Field at a higher price than was provided to be paid for plaintiffs' gas, defendant was bound to pay plaintiffs for the gas delivered under their contract at a price increased by an amount equal to the differences between the price provisions of plaintiffs' contract with defendant and the concurrently effective higher price provisions of defendant's contract with the other party seller. To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the

spirit and intent of article 2040 and the jurisprudence of this court.[6]

The court of appeal also reasoned that plaintiffs' recovery of damages for the period of defendant's breach prior to October 1972 must be denied because such recovery would necessarily assume that a price increase would have been granted by the Commission. The appellate court concluded that the issue as to whether such approval would have been granted by the Commission was highly speculative and could not serve as a basis for an award of damages.

Actual damages arising from a breach of contract must be proven; they cannot be merely speculative or conjectural. Brown v. Producers' Oil Co., 134 La. 672, 64 So. 674 (1914). It must appear reasonably certain that the amount of damages rests upon a certain basis. Brown v. Producers' Oil Co., *supra.* Such proof need be only by a preponderance of the evidence; proof by direct or circumstantial evidence is sufficient to constitute a preponderance when, taking the evidence as a whole, such proof shows that the facts or causation sought to be proved is more probable than not. *Cf.* Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971). The sufficiency of proof of damages must be determined in relation to the particular contract at issue and the circumstances surrounding its

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[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, "[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition." 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959).

breach. The question of the certainty of proof of damages becomes a matter for decision in each individual case. Angelloz v. Humble Oil & Refining Co., 196 La. 604, 199 So. 656 (1940).

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely. It is our opinion that, taking the evidence as a whole, plaintiffs' proof shows that it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed. It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

We must next determine whether W. E. Hall, Jr. waived any claim against defendant for damages arising on and after May 25, 1969, because, on that date, he entered into a contract with defendant wherein he deleted the favored nations clause from the January 11, 1952 agreement. Plaintiffs argue that Hall executed the May 25, 1969 agreement

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[7] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

without being informed by defendant that it had activated the favored nations clause of the original agreement and that defendant misrepresented facts to Hall by informing him that it was paying plaintiffs the highest prices that it was paying any other party sellers for gas produced from the Sligo Field. Plaintiffs contend the May 25, 1969 agreement is void because Hall executed it under an error of fact.

Hall's testimony indicates that in 1969 he possessed an interest in a well (referred to as the Harvey well) under contract to Texas Gas Producing Company (Texas) with the natural gas produced therefrom being sold to Texas. In 1969, the Harvey well was nearly depleted and its pressure was dropping. The pressure on the Texas pipeline serving the Harvey well was too high for such gas to be carried through the pipeline. Hall stated that he was confronted with a situation where he was either going to have to "junk the well," buy a compressor and continue selling to Texas, or obtain a release from Texas and sell to another party with a lower pipeline pressure. After learning that the pressure on defendant's pipelines was lower than that on Texas' pipelines, Hall obtained a release from Texas and negotiated with defendant to take the gas from the Harvey well. An agreement was executed wherein defendant amended the January 11, 1952 gas purchase agreement to also cover Hall's share of the production from the Harvey well. This amendment also deleted the favored nations clause from the January 11, 1952 gas purchase contract. Hall maintained that had he been aware of the fact that defendant was paying a higher price to another party seller in the Sligo Field, he would not have agreed to the deletion of the favored nations clause. Hall also stated that his primary purpose in executing the May 25, 1969 agreement with defendant was to avoid having to purchase and operate a compressor and to be able to continue selling gas from the Harvey well.

Consent of the parties legally given is a requisite to the validity of a contract. La. Civil Code art. 1779. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent where it has been produced by error. La. Civil Code art. 1819. An error of fact proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. La. Civil Code art. 1821. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. La. Civil Code art. 1823. To have that effect, the error must be in some point, which was a principal cause for making the contract and when there are several this principal cause is called the *motive* and means that consideration without which the contract would not have been made. *Id.* & art. 1825. No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it. La. Civil Code art. 1826. These articles of our Code simply mean that error in the determining motive, or principal cause, of a contract vitiates consent and invalidates the contract. Error as to a subsidiary motive has no effect upon the validity of the contract. Cryer v. M & M Manufacturing Co., Inc., 273 So. 2d 818 (La. 1972); Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964); Carpenter v. Skinner, 224 La. 848, 71 So. 2d 133 (1954).

A review of the record convinces us that the error relied upon by plaintiffs to invalidate the May 25, 1969 agreement was not an error in the determining motive, or principal cause, of the agreement. Hall's testimony clearly indicates that the determining motive, or principal cause, of the agreement was his desire to continue selling gas from the Harvey well and to avoid purchasing and operating a

compressor for the Harvey well. Any error relating to the issue as to whether defendant had activated the favored nations clause of the original agreement was only error as to a subsidiary motive and has no effect upon the validity of the May 25, 1969 agreement. Hence, we determine that the May 25, 1969 agreement is not invalid as having been executed by Hall under an error of fact.

We construe plaintiffs' allegations as a contention that the misrepresentations and omissions of defendant invalidated the contract because they constituted fraud.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. La. Civil Code art. 1847. Two elements are essential to constitute legal fraud: the intention to defraud and loss or damage or a strong probability of loss or damage. Buxton v. McKendrick, 223 La. 62, 64 So. 2d 844 (1953). It is well setted that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced. Buxton v. McKendrick, *supra;* Sanders v. Sanders, 222 La. 233, 62 So. 2d 284 (1952).

The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud.[8] Hence,

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[8] In fact, it appears that the deletion of the favored nations clause from the original agreement was an effort by defendants to comply with the orders and regulations of the Federal Power

the May 25, 1969 agreement executed by W. E. Hall, Jr. cannot be invalidated on the basis of alleged fraudulent conduct of defendant.

In sum, we conclude that the May 25, 1969 amendment to the original gas purchase contract executed by W. E. Hall, Jr. is a valid and enforceable agreement. Since the effect of this agreement was to delete the favored nations clause from the original contract, W. E. Hall, Jr. has no claims for damages against defendant arising on or after May 25, 1969.

Decree

For the reasons assigned, judgment of the court of appeal is amended to allow plaintiffs (except W. E. Hall, Jr.) an award of damages measured by the difference between the price paid the United States government and the price defendant paid plaintiffs for the entire period of defendant's breach of contract from September 1961 through December 31, 1975; W. E. Hall, Jr.'s recovery of damages against defendant is to be measured for the period of time from September 1961 through May 24, 1969. The case is remanded to the district court for assessment of damages in accordance with the views herein expressed.

Commission. By Order No. 232 A (25 F.P.C. 609), issued March 31, 1961, the Commission amended its regulations so as to provide that indefinite price escalation clauses (including favored nations clauses) in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission would be inoperative and of no effect at law. By Order No. 242 (27 F.P.C. 339), issued February 8, 1962, the Commission further amended its regulations to provide for the rejection of contracts containing such indefinite escalation clauses. *See* 18 C.F.R. §§ 154.93, 157.14 and 157.25.

SUPREME COURT OF LOUISIANA

No. 62560

FRANK J. HALL et al.

Versus

ARKANSAS-LOUISIANA GAS COMPANY

DIXON, Justice (concurring)

I fully subscribe to the opinion, but believe C.C. 2040 is applicable only by analogy, and that C.C. 2040 is probably a clarification of the original French text, not an "inaccurate" translation.

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112
FOR IMMEDIATE RELEASE

On the 9th day of April, 1979, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * *

REHEARINGS DENIED:

* * *

62,560 HALL v. ARK-LA. GAS

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 225,699

FRANK J. HALL, et al

versus

ARKANSAS LOUISIANA GAS COMPANY

JUDGMENT

The Louisiana Supreme Court in the case of "*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket Number 62,560, Supreme Court of Louisiana" on March 5, 1979 rendered a judgment on the merits of this contractual dispute. The judgment of the Louisiana Supreme Court dated March 5, 1979 became definitive on April 9, 1979 when the Louisiana Supreme Court denied Arkansas Louisiana Gas Company's "Application For a Rehearing".

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record of this case there be judgment herein in favor of the following Plaintiffs against the Defendant, ARKANSAS LOUISIANA GAS COMPANY, awarding to said Plaintiffs compensatory damages in the sums as hereinafter set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through December, 1975, to wit:

FRANK J. HALL	— $423,167.91
VIRGIL J. HALL, widow	— 115,409.27
CARLYLE W. URBAN, Trustee under Will of H. M. HARRELL	— 634,233.61

John K. Harrell, Sr.	—	79,278.48
James E. Harrell	—	79,278.48
Elva L. Weiss, widow	—	177,666.20
National American Bank, Executor under Will of Seymour Weiss	—	177,666.20
T. F. Philyaw	—	3,712.38
W. O. Cochran	—	14,513.62
D. B. McConnell	—	132,193.25
S. G. Myers	—	130,215.91
James A. Noe, Jr. and C. T. Munholland, Testamentary Executors under Wills of Mr. & Mrs. James A. Noe	—	478,528.37
Asa Benton Allen	—	67,282.56
Elaine Allen	—	65,234.33

It Is Ordered, Adjudged and Decreed that the above and foregoing Plaintiffs are awarded legal interest on $1,677,-168.06 of the above and foregoing compensatory damages from July 1, 1976 until paid and that the remaining damages, i.e. $901,212.51, shall not bear or accrue any legal interest whatsoever.

It Is Ordered, Adjudged and Decreed that pursuant to the Judgment of the Louisiana Supreme Court dated March 5, 1979 and the evidence contained in the record in this case there shall be judgment herein in favor of Mr. W. E. Hall, Jr., Plaintiff, against the Defendant, Arkansas Louisiana Gas Company, awarding to said Plaintiff compensatory damages in the sum as herein set forth for the actual losses caused by Arkansas Louisiana Gas Company's breach of contract from September, 1961 through May 24, 1969, to wit:

W. E. Hall, Jr.	—	$160,507.83

It Is Ordered, Adjudged and Decreed that W. E. Hall, Jr. is awarded legal interest on $97,208.42 of said compensatory damages from May 25, 1969 until paid and that $63,299.41 of the damages as awarded to Mr. W. E. Hall, Jr. shall not bear or accrue any legal interest whatsoever.

It Is Ordered, Adjudged and Decreed that Plaintiffs are awarded a recovery herein for all costs of this proceeding.

Judgment Read, Rendered and Signed on May 17, 1979 at Shreveport, Louisiana.

/s/ C. J. Bolin, Jr.
C. J. Bolin, Jr.
District Judge

Endorsed Filed, W. C. Young, Deputy Clerk, May 17, 1979.

A True Copy—Attest

/s/ W. C. Young, Deputy Clerk

[Judgment rendered January 22, 1980]

No. 14,012

COURT OF APPEAL SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * * *

FRANK J. HALL, ET AL, *Plaintiffs-Appellees*

VERSUS

ARKANSAS LOUISIANA GAS COMPANY, *Defendant-Appellant*

* * * * * * *

Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana

Honorable C. J. Bolin, Jr., Judge

* * * * * * *

BLANCHARD, WALKER, O'QUIN & ROBERTS

By: Robert Roberts, Jr., Marlin Risinger, Jr., and W. Michael Adams

Attorneys for Defendant-Appellant, Arkansas Louisiana Gas Company

WIENER, WEISS, MADISON & HOWELL

By: James Fleet Howell

Attorneys for Plaintiffs-Appellees, Frank J. Hall, et al

* * * * * * *

Before PRICE, MARVIN and JONES, JJ.

MARVIN, J.

On the original appeal of this case in 1978, we affirmed a judgment activating a *favored nation clause* in a 1952 gas purchase contract which escalated the price of interstate natural gas purchased from the several plaintiffs by defendant Arkla. Plaintiffs there claimed that damages should have been assessed from September 1961, when Arkla began paying a higher price to another seller (the United States), through the year 1975 when suit was brought.

We affirmed the lower court's determination that all plaintiffs except W. E. Hall were entitled to damages only from October 1, 1972 (when plaintiffs were excused by FERC from having to meet FERC requirements to obtain a price increase). W. E. Hall's demands were dismissed on an exception of no cause of action because he had executed an agreement on May 25, 1969, deleting the favored nation clause from his 1952 contract.

The original damage award to plaintiffs totaled more than $900,000. This amount was determined by comparing the price paid to plaintiffs and to the government (for gas and products extracted from the gas) for the entire period (1961-1975). The lower court then proportionately reduced the amount for the entire period to determine the amount for 1972-1975. We remanded because neither party had *pursued* the lower court's suggestion for expert assistance and had not provided the lower court with *means* to accurately reduce or extract the 1961-1975 data to facilitate determination of the damages for the 1972-1975 period.[1]

The Supreme Court granted writs and held in 1979 that the damages for all plaintiffs, except W. E. Hall, should be measured from September 1961 through 1975 and that W. E. Hall should be allowed damages for the period from September 1961 until May 25, 1969 (when he executed the

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[1] 359 So.2d 255 (La. App. 2d Cir. 1978).

agreement deleting the most favored nations clause from his contract). The Supreme Court "remanded to the district court for assessment of damages in accordance with [its] . . . views . . ."[2]

On remand, the district court apparently considered that the computations and summaries used by the court in originally assessing damages for the 1961-1975 period, and which were contained in the original record and generally approved by us on the original appeal, provided a sufficient evidentiary basis for it to determine the damages to plaintiffs for that period. The district court allowed Arkla to present evidence on remand only as to the damages sustained by plaintiff W. E. Hall for the period 1961 to May 25, 1969.[3]

After remand, the lower court awarded W. E. Hall $160,507.83 and the remaining plaintiffs a total of $2,738,888.40, which was approximately the amount the trial court reduced on the original trial to compute damages for the 1972-1975 period. Arkla appeals this judgment, contending that the award to the remaining plaintiffs exceeds both the amount paid by Arkla to the United States during the period and the maximum ceiling rates for natural gas allowed by FERC during the period, all in violation of the contract and in violation of the Natural Gas Act (15 U.S.C. § 717 a-w). Plaintiffs seek additional damages, contending that Arkla's appeal is frivolous.

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[2] 368 So.2d 984 (La. 1979).

[3] As we noted in the original appeal, Arkla was in a superior position to compile and present evidence of the difference in price paid to plaintiffs and to the *favored nation* (the United States) during the period and to compare the pertinent factors upon which the difference in price could be determined. We also noted that neither the plaintiffs nor Arkla pursued the lower court's suggestion that perhaps an expert should be appointed to assist in determining the damages. Again we mention that the pleadings and testimony fill 26 volumes of almost 5,000 pages and that the record includes almost 500 exhibits, some of which are voluminous.

The central issue in this appeal involves the sufficiency of the evidence used in comparing the difference in the price provisions of the two contracts, one contract being the gas purchase contract in 1952 containing the favored nation clause, and the other being the lease contract with the United States of America in 1961, payments under which have been construed as activating the favored nation clause of the other contract.

Under the 1961 lease, Arkla paid the government for the value of liquid hydrocarbons extracted from the natural gas and for the dry (residue) gas remaining after the extraction. Under the 1952 gas purchase contract with plaintiffs Arkla purchased "production from all wells . . . completed as commercially productive of natural gas" subject to the several terms and conditions of the contract. Section 8 of the contract, sub-part D of which contains the most favored nation clause, stipulated the price to be paid for each MCF of gas delivered to Arkla, but recognized that the stipulated price included an additional $.0025 per MCF to compensate the seller for the surrender of rights to receive the value of the LHC extracted by processes *after* delivery to Arkla. Section 8(B) apparently would allow the seller to extract condensate by a separator at the well *before* delivery to Arkla. Section 9 gives Arkla the option of purchasing free condensate that may be produced and recovered from the well by separators and obligates Arkla to pay for such condensate at a "posted" price. This section contains no language relieving Arkla of its obligation to pay the seller for the free condensate even if the condensate is delivered into Arkla's gas gathering lines and then later extracted. Some of the provisions of §§ 8 and 9 are reproduced below:

"8. Price

"(A) (1) The price to be paid by Buyer for each one thousand cubic feet of gas delivered hereunder to Buy-

er, on the basis of measurement and calculations hereinafter provided, shall be as follows:

"(a) $0.06997 from the effective date hereof through May 31, 1955;

* * * [graduated to]

"(e) $0.10596 from June 1, 1970, through May 31, 1975;

"(f) $0.11496 during the remainder of the time this agreement shall be in force and effect.

* * *

"(B) The prices . . . paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquifiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products, it being further understood and agreed, however, that nothing herein is intended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. *The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recov-*

erable from the production delivered to Buyer hereunder.

"(C) If in accordance with the provisions of Paragraph (B) of Section 4 of this contract, Buyer dehydrates the gas delivered hereunder, then Seller shall pay to Buyer as a dehydration charge the sum of \$0.002 for each one thousand cubic feet of gas dehydrated, which dehydration charge may be deducted by Buyer from remittances due Seller hereunder.

"(D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field *at a higher price than is provided to be paid for gas* delivered under this agrement, then in such event the price to be paid *for gas* thereafter delivered hereunder shall be increased by an amount equal to the *difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided* that in determining whether a given price is in fact 'higher' than the price provisions of this contract, *the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures* (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder *shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts.* It is agreed that any

such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

"9. CONDENSATE. *Buyer,* or its assign, ***shall have the option*** from time to time and upon sixty (60) days' notice, *of purchasing* all of the *free condensate* that may be produced from the subject wells and ***which may be recovered*** or recoverable *by the use of separators* operated in connection with such wells, and measured by liquid meter, or liquid gas ratio tests as hereinafter set forth, *and shall accept delivery of such condensate into the gas gathering lines or* at Seller's option *from Seller's storage tanks* located on the leases. Buyer, or its said assign, shall deliver to Seller written notice of the exercise of its said option and may discontinue the purchase of condensate by giving Seller sixty (60) days' written notice that it no longer desires to purchase same.

* * *

"*Buyer shall pay* or cause to be paid *to Seller,* for condensate received in accordance with the provisions of this Section, *the price posted by Buyer* or its said assign, as the case may be. Provided, however, that such posted price shall be in line with the prices established by the majority of major oil companies for similar grade condensate in fields in North Louisiana."

Emphasis by the Court.

Arkla insists that the FERC ceiling on gas, whether *wet* (before extraction of LCH [liquid hydrocarbons]) or *dry* (after extraction of LHC) is the sole basis upon which damages should have been assessed and that the price it

pays or paid to the United States for the extracted LHC is not a factor to be considered. Arkla argues that consideration of the price it pays or paid to the United States for LHC ignores and is in the face of the express language of plaintiffs' 1952 gas purchase contract that plaintiffs sold to Arkla only wet gas. The crux of this case is not that plaintiffs sold wet gas, but consideration of the purpose of the favored nation clause, the fact that a portion of the stipulated MCF price for gas under the 1952 contract (¼ cent) was for LHC, and the decisions of state and federal authorities in this controversy that the price Arkla paid the United States for LHC is a "pertinent factor" to be used under section 8 of the 1952 contract in interpreting the favored nation clause and in determining the difference in the price provision of the two contracts. The price provisions can be and have been compared.

Again we determine that for the purpose of giving effect to the favored nation clause—section 8 of the contract, the higher price the United States began to receive from Arkla in 1961 for gas and for LHC is the basis upon which to assess and measure the amounts plaintiffs should have begun to receive monthly from Arkla in 1961 for its gas and LHC. Arkla conditionally concedes as much in its first reply brief:

> "The values paid by Arkla to the United States for extracted plant products can and must be considered under this Court's May 1, 1978, judgment [359 So.2d 255 (La. App. 2d Cir.)] as a pertinent factor to determine the overall price paid to the government on a per Mcf basis. The Court has held that it is a pertinent factor and Arkla cannot attack that holding on this appeal. However, when the Court made that decision, the effect of the application of that pertinent factor on the Plaintiffs' monetary recovery was left to the Trial Court on remand. The Trial Court has considered the issues on remand and has rendered an award in its

> May 17, 1979, judgment, that is *again* grossly in error. This time, the [trial] Court failed to consider the limitations placed upon the award by the Natural Gas Act. The Plaintiffs award should be limited [to a total of $1,609,067.11] . . ."

We cannot agree that the trial court erred.

We reiterate that the purpose of the favored nation or price adjustment clause is to protect the seller under a long-term contract from price discrimination. A contract with favored nations provisions should be interpreted broadly, and not restrictively, to fully effect the provisions. 359 So.2d at p. 262. See also *Eastern Petroleum Company v. Kerr-McGee Corporation,* 447 F.2d 569 (C.A. 7th, 1971). Arkla paid the United States for gas and for LHC. Arkla paid plaintiffs for gas and LHC. Section 8(D) of plaintiffs' contract states that ". . . in determining whether [the price paid the United States for "gas"] is in fact 'higher' than the price provisions of [plaintiffs'] contract, the inquiry shall not be limited to the actual prices stipulated [for "gas"], but *due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts such as*

> point of delivery,
>
> basis of measurement,
>
> taxes,
>
> dehydration, and
>
> delivery pressure . . .

and the price to be thereafter payable [to plaintiffs] *shall be adjusted accordingly* insofar as *may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts . . . subject to any rules and regulations of . . . any . . . regulatory body having jurisdiction."*

We have again reviewed in the original record, summaries and the testimony of the plaintiff-expert at whose direction they were prepared. We do not depart from our 1978 observation.[4] We remanded in 1978, not because we thought that this evidence was deficient or suspect or that plaintiffs' recovery should be limited by the amount that Arkla paid the United States for its *dry* gas after LHC extraction. In the 1952 contract, *gas* includes LHC and the price provisions of the contract provide a price for both.

The lower court originally used the data summaries and testimony relating to the comparison of pertinent factors for the entire period (1961-1975) to determine damages for the 1972-1975 limited period that the lower court and we thought damages were owed.[5] The lower court propor-

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[4] In our 1978 opinion we observed that the plaintiff-expert

> "... gathered all of the pertinent data necessary to calculate damages . . . for the entire period . . . 1961 through . . . 1975. Based on the data obtained . . . schedules [were prepared to reflect a comparison in the price . . . paid . . . plaintiffs with that . . . paid to the United States . . . during this fourteen-year-period . . . [and] which related to the differential in the price of gas to the volumes sold by plaintiffs to defendant for the period. Built into these summaries are the adjusting factors . . . considered necessary to render the prices comparable. These summaries were . . . extended to calculate . . . interest on the sums claimed during the period."
>
> 359 So.2d at 264.

[5] We note that the FPC-FERC agreed with the original determination by the lower court and by this court that damages were due for the limited period 1972-1975:

> * * *
>
> "Prior to 1972 the Hall group did not hold small producer certificates. In the 'Order Denying Application for Rehearing' issued June 5, 1976, the FPC stated on p. 2, n. 1.:
>
> > 'Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on

tionately reduced the damages for the 1961-1975 period ($2,800,000) by 68 percent to determine the damages for the 1972-1975 period ($900,000). We remanded because neither party had *pursued* the lower court's suggestion for expert assistance and had not provided the lower court with *means* to accurately reduce or extract the 1961-1975 data to facilitate determination of the damages for the 1972-1975 period. We were then, as we are now, satisfied that plaintiffs are entitled to have the favored nation clause

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file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

"The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

"It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 349 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of certiorari has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978."

Arkansas Louisiana Gas Company v. Frank F. Hall, et al, Docket No. RI-76-28, Order Declining Jurisdiction After Reconsideration of the Issue on Remand, issued May 18, 1979, footnote 18. See also footnote 20.

The U.S. Supreme Court denied certiorari on October 1, 1979.

interpreted to allow them an escalation of the amounts Arkla paid plaintiffs for gas (whether wet or dry) and for any extracted LHC (originally ¼ cent per MCF) determined by the price Arkla paid the United States for its gas (albeit dry) and for the extracted LHC. The Supreme Court of Louisiana agreed and FERC so understood.

> "The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate."
>
> Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5.

Section 8 of the 1952 contract, pertinent parts of which have been quoted, effectively states that the price Arkla pays for each MCF of *gas* includes ¼ cent for [LHC and] other products which may be recoverable from the gas. On the *basic contract question* (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas *and* for LHC products severed from its gas. In effect Arkla paid the government and the plaintiffs for *wet* gas. The eventual price was determined by the MCF after extraction of LHC and by the price for the LHC. The price plaintiffs received for its gas after extraction of LHC and for the LHC was less than what the government received.

The 1952 contract provides that, once the favored nation clause is activated, the increase plaintiffs shall receive shall be ". . . an amount equal to the difference between *the price provisions* [of the 1952 contract] and the . . . higher *price provisions* of [the 1961 contract with the

United States] . . ." The price provisions of plaintiffs' contract and of the United States' contract have been compared and the difference has been determined. Plaintiffs should receive for their gas and for the LHC in the gas the higher amount the United States was receiving for its gas *and* the LHC in the gas. *Gas* in the 1952 contract includes the LHC. Each contract contains price provisions for gas and for LHC. When the price provisions of the two contracts, comparing the pertinent factors, are considered, plaintiffs are entitled to the damages assessed.

Plaintiffs are not entitled to damages for frivolous appeal. At Arkla's cost, judgment is AFFIRMED.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Office of the Clerk, Shreveport, Louisiana. February 29, 1980

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Defendant-Appellant have this day been refused, en banc.

FRANK J. HALL, ET AL

versus

ARKANSAS LOUISIANA GAS CO.

Docket No. 14,012

Comments (if any were given by the Court):

Sincerely,

Harold L. Booth
Clerk of Court

cc:

Mr. James Fleet Howell
Wiener, Weiss, Madison & Howell
411 Commercial Bank Building
Shreveport, La. 71101

Blanchard, Walker, O'Quin & Roberts
Attorneys at Law
P. O. Drawer 1126
Shreveport, La. 71163

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

No. 67,225

FRANK J. HALL, ET AL

VS

ARKANSAS LOUISIANA GAS COMPANY

In Re: Arkansas Louisiana Gas Company, applying for Certiorari, or Writ of Review, to the Court of Appeal, Second Circuit, No. 14,012, Parish of Caddo.

May 2, 1980

Denied.

JCW

JAD

PFC

WFM

FAB

A TRUE COPY

Clerk's Office
Supreme Court of Louisiana
New Orleans

May 2, 1980

/s/ FRANS J. LABRANCHE, JR.
Clerk of Court

APPENDIX C

SELECTED EXHIBITS AND PLEADINGS P-1

Filed in Evidence in Suit No. 225699, September 27, 1976

THIS AGREEMENT, executed this 11th day of January, 1952, by ARKANSAS LOUISIANA GAS COMPANY as the party of the first part (hereinafter referred to as "Buyer"), and by certain parties of the second part (hereinafter collectively referred to as "Seller") whose signatures are hereunto subscribed,

WITNESSETH:

Seller desires to sell to Buyer production from certain commercially productive natural gas properties in the *Sligo Gas Field, Bossier Parish, Louisiana,* and Buyer desires to purchase said production for use in the regular conduct of Buyer's business as a gas utility, all in accordance with the terms and conditions hereafter in this contract appearing,

NOW, THEREFORE, for and in consideration of the premises and mutual covenants herein contained, the parties hereto do covenant and agree as follows:

1. *PROPERTIES SUBJECT HERETO.*

(A) Subject to all the terms and conditions of this contract, this agreement shall cover the production from all wells now or hereafter completed as commercially productive of natural gas on the lands, leases, and unitized tracts in the *Sligo Gas Field, Bossier Parish, Louisiana,* described in *Exhibit A* which is attached hereto and hereby made part hereof. As used in this agreement, except as hereinafter qualified, the term "well" shall refer to any and all drilling and production units commercially productive of natural gas and now, or at any time hereafter during the term hereof, located, either wholly or partially, on the properties described in the aforesaid *Exhibit A*; if a well

be completed in more than one formation, each producing formation shall be considered a separate well.

(B)(1) Buyer shall not be obligated to connect its gathering system with and receive gas from any well having an open flow potential productive capacity of less than two million (2,000,000) cubic feet of gas per day, but may do so, at its option.

(2) Buyer shall not be obligated to continue receiving gas hereunder from any given well or wells which will not deliver to Buyer 100,000 cubic feet of gas per day under all the terms and conditions of this contract, provided that Buyer may, at its option, continue receiving gas from such well or wells.

(3) Seller reserves the right to deliver to lessors of any of Seller's leases covering properties from which gas is delivered hereunder sufficient gas to meet the requirements of Seller's obligations as lessee to furnish gas to such lessors.

(4) Seller reserves the right to use from Seller's properties such gas as may be necessary for development of Seller's properties situated in the same field, including but not limited to the use of gas for fuel, drilling, and operating said properties for the production and delivery of oil, gas or other minerals.

(C) (1) If for any reason whatsoever less than 100% of the production from any given well or wells is covered by this agreement during all or any part of any given contract year, then Buyer's rights and obligations hereunder, including its minimum take obligations under the Section hereof pertaining to Quantities, shall be adjusted proportionately.

(2) Buyer may, at its option, refuse to connect its gathering system with and receive gas from any well now or hereafter completed in which Seller owns less than a fifty per cent (50%) interest as of the date Seller's interest in such well would otherwise be subject hereto unless enough

of the other interest owners in any such well agree that their interest in the gas production therefrom shall be delivered to Buyer as to make it economically feasible, in Buyer's opinion, to receive delivery of production from such unit. Any well in which Seller owns more than a fifty percent (50%) interest shall be subject hereto.

2. *EFFECTIVE DATE AND COMMENCEMENT OF DELIVERIES.*

(A) This agreement shall not be effective unless the owners of at least fifty-one percent (51%) of the interest in each of the wells subject hereto execute same prior to January 26, 1952.

(B) Subject to the timely execution hereof by the owners of at least fifty-one percent (51%) of the production from each of the wells subject hereto as in the preceding paragraph hereof provided, this agreement shall be effective as to all such parties seller who have thus executed this agreement prior to January 26, 1952, as of May 26, 1951; as to all parties owning an interest in the subject wells who execute this agreement as a party seller on or after January 26, 1952, this contract shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the date on which such party seller executes same.

(C) It is understood and agreed that until this agreement is effective as to a given party seller all or any part of whose interest in any of the subject property is covered by a prior agreement with Buyer, the gas attributable to said interest of such party seller shall continue to be delivered to Buyer under the terms and conditions of such prior contract. This agreement shall, as of its effective date as to a given party seller, supersede all previous agreements, and any supplements or amendments thereto, between Buyer and such party seller covering such party seller's interest in any or all of the subject properties, provided that nothing herein is intended, nor shall in any manner operate, to

cancel or supersede any prior agreement or agreements or amendment or amendments to such prior agreement or agreements covering all or any part of the subject property insofar as such prior agreement or agreements or amendments thereto cover any interest or interests in the subject property which interest or interests are not subject to the instant contract, it being understood and agreed that Buyer does not by this agreement intend to waive or renounce any rights whatsoever which Buyer may have under or by virtue of any such prior agreement or agreements and amendments thereto except insofar as such prior agreements are superseded hereby as to the particular parties seller actually executing this agreement, and Buyer hereby expressly reserves any and all such rights.

(D) Deliveries of gas from wells presently connected to Buyer's gathering system shall commence on the effective date hereof; deliveries of gas from other wells now or hereafter subject hereto shall commence upon the prompt and efficient completion and placing in operation of any facilities which must necessarily be constructed hereunder prior to such commencement of deliveries.

3. *TERM.* This contract shall continue and remain in full force and effect until June 1, 1980, and from year to year thereafter, unless or until terminated, as it may be by either party by written notice to the other party given thirty days prior to the date upon which termination is desired, it being understood and agreed that such termination date may be and may only be June 1, 1980, or any subsequent anniversary of that date.

4. *CONSTRUCTION, OPERATION, AND MAINTENANCE OF FACILITIES.*

(A) Buyer shall be responsible for the construction, operation and maintenance of such field gathering facilities as may be necessary for Buyer to receive the gas delivered hereunder into Buyer's field gathering system.

(B) Seller shall not be obligated to dehydrate the gas prior to delivery hereunder, and any dehydration necessary shall be done by Buyer, all subject, however, to the provisions of Paragraph (C) of Section 8 of this contract providing for the payment of a dehydration charge by Seller. It is agreed that dehydration is necessary if the gas delivered hereunder has a water content in excess of seven pounds of water per one million cubic feet of gas as determined by dew point test apparatus operated by Buyer in accordance with the Bureau of Mines method or such other method as the parties may agree upon.

5. *POINT OF DELIVERY AND TRANSFER OF TITLE.* Gas sold hereunder shall be delivered to Buyer, and title thereto shall pass to Buyer at the outlet side of Buyer's metering equipment located at or near each of the wells subject hereto.

6. *QUANTITIES.*

(A) The parties recognize that Buyer will also receive gas during the term of this contract from other wells in the Sligo Gas Field besides those wells which are subject to this particular contract, and that this Section sets up a system of withdrawal in terms of all wells delivering gas to Buyer from this Field. Buyer and Seller hereby agree to be bound by the provisions of this Section 6 to the extent that wells subject to this contract are affected hereby and Buyer's receipts of gas from subject wells shall be in accordance with the procedures herein set forth. It is also recognized, however, that the provisions hereinafter in this Section 6 appearing have been agreed to by Buyer on the assumption that Buyer will have the right to receive 100% of the gas production from all "Sligo wells" over the entire course of any given annual period, and to the extent that all of the production from any particular Sligo well or wells is not thus deliverable to Buyer, then it is understood and agreed that the provisions hereof shall be subject to appropriate proportionate adjustment.

(B) The following terms shall have the meanings hereinafter in this Subsection (B) accorded them when used in this Section 6:

(1) The term "Sligo well", as used in this Section 6, shall refer to a well now or hereafter completed in the Sligo Gas Field, as the same is now or may hereafter be constituted, from which Buyer received gas during a given annual period, without regard to whether such well be subject to this particular contract or not; in the case of multiple completions each producing formation shall be considered a separate well.

(2) The term "marginal well" shall refer to a Sligo well which is not physically capable of lawfully delivering to Buyer over a given annual period under all the rules and regulations of any regulatory body having jurisdiction and under the terms and conditions of the agreement by virtue of which Buyer receives gas from such well 365.-000,000 cubic feet of gas plus such quantity of "excess gas", if any, as would otherwise be receivable from such well under the provisions hereof.

(3) The term "capable well" shall refer to a Sligo well which is physically capable of lawfully delivering to Buyer during a given annual period under the rules and regulations of any regulatory body having jurisdiction and in accordance with and subject to the terms and conditions of the agreement by virtue of which Buyer receives gas from such well at least 365,000,000 cubic feet of gas plus such quantity of "excess gas", if any, as may be receivable from such well under the provisions hereof.

(4) The term "average acreage" shall mean that acreage which will result in allocating 365,000,000 cubic feet of gas to a well when the total quantity of gas received by Buyer over a given annual period from all capable wells delivering to Buyer over said annual period is allocated ratably among all such capable wells in the proportion that

the developed producing acreage attributable to a given capable well bears to the total developed producing acreage attributable to all such capable wells.

(5) The term "excess acreage" shall mean the extent that the developed producing acreage attributable to a given capable well is in excess of the average acreage.

(6) The term "excess gas" shall mean the extent by which Buyer's total receipts of gas from all capable wells during any given annual period exceeds that quantity resulting when the number of such capable wells be multiplied by 365,000,000 cubic feet of gas.

(C) (1) During any given annual period Buyer shall receive from each marginal well all the gas such well is physically capable of lawfully delivering to Buyer under the rules and regulations of any regulatory body having jurisdiction and in accordance with and subject to the terms and conditions of the agreement by virtue of which Buyer is receiving delivery of gas from such well. The parties recognize that neither the quantities of gas received from marginal wells nor the developed producing acreage attributable to marginal wells are considered in the calculations of "average acreage", "excess acreage", or "excess gas."

(2) During any given annual period Buyer shall receive from each capable well 365,000,000 cubic feet of gas (sometimes herein referred to as "minimum take") and shall have the right, but not the obligation, to receive larger volumes of gas from any such well physically capable of lawfully delivering same to Buyer hereunder.

(3) Any "excess gas" received by Buyer during any given annual period shall be prorated ratably among all capable wells delivering to Buyer over said period to which "excess acreage" is attributable in the proportion that the "excess acreage" attributable to a given capable well bears to the total "excess acreage" attributable to all such capable wells.

(4) Since the calculation of "average acreage" for any particular annual period will necessarily depend upon the quantity of gas actually received by Buyer from all capable wells during such period and accordingly it will be impossible for Buyer to receive the exact quantity of "excess gas" from each well entitled to a prorata share thereof during said annual period, it is agreed that to the extent that actual receipts of "excess gas" by Buyer from capable wells during a given annual period be greater than or less than the respective quantities which should have been received from such wells under the provisions hereof during said period, the "minimum takes" to be received from such wells during the ensuing annual period shall be correspondingly reduced or increased in order that disproportionate withdrawals of "excess gas" during the given year will be thus balanced out among all such wells by appropriate adjustments of the minimum takes applicable to the wells during the ensuing annual period.

(D) It is the intention of the parties that this Section 6 have no retroactive application prior to the execution date hereof, anything in Section 2 hereof to the contrary notwithstanding, and it is hereby stipulated that Buyer's take obligations under this or any previous contracts in respect of any interests as to which Section 2 makes this contract effective as of May 26, 1951, are completely satisfied by whatever volumes of gas Buyer actually received from said interests between May 26, 1951, and the execution date hereof.

(E) It is expressly understood and agreed, however, that Buyer shall not be obligated to receive any additional quantities of gas under this contract by reason of the completion hereafter of a new well on acreage attributable to a well which is subject hereto at the time of the completion of such new well if such new well is completed in the same producing zone as the said previously existing well; in such case the quantities of gas which Buyer is obligated to re-

ceive hereunder from the said previously existing well, may, at Buyer's option, be withdrawn from either or both the said wells and the two may, at Buyer's option, be considered for purposes of this contract as one and the same well.

(F) The parties take cognizance of the fact that Buyer's needs for gas will fluctuate over the course of a year, and Buyer shall have the right to vary its rate of take from time to time and to receive from any given well or wells as little gas as 15,000,000 cubic feet during any given accounting month, provided that Buyer balance its takes over reasonable periods of time.

7. *DELIVERY PRESSURES.*

(A) *Maximum Delivery Pressure.* Seller shall make deliveries of gas hereunder at whatever pressures may be required by Buyer from time to time up to that pressure necessary to effect deliveries hereunder against a pressure of *850* pounds per square inch gauge at the point of delivery.

(B) *Compression.* If the natural flowing pressure at which gas is produced from a given well or wells is insufficient to effect deliveries of gas hereunder from such well or wells at the pressure required by Buyer under Paragraph A of this Section 7, Seller shall have the prior right to compress the gas in order to deliver same at the required pressure. To that end Buyer shall make written request upon Seller to install and operate the necessary compression equipment whenever the need for same exists as to a given well or wells. It is provided, however, that if Seller ever refuses to operate the necessary compression equipment (and it is expressly agreed that failure to place compression facilities in operation within 180 days after receipt of any such notice of the necessity therefor from Buyer shall constitute a refusal by Seller to operate such equipment) or fails to continue the efficient operation of any such

equipment after having once commenced, then Buyer shall have the right, but not the obligation, to install and operate, or utilize its existing, compression facilities to compress any or all gas thereafter delivered under this contract without the necessity of further notice to Seller, and it is understood and agreed that Seller's right to install and operate or continue operating compression equipment after Buyer has commenced compressing any gas delivered hereunder shall thereafter be subject to Buyer's right, at Buyer's option, to compress any or all gas thereafter delivered hereunder. Buyer may discontinue compressing gas from any or all wells at any time by giving 30 days notice to Seller whereupon Seller may compress the gas from any such well or wells. If in accordance with the provisions of this paragraph, Buyer commences operation of any such compression equipment, Seller shall thereafter pay to Buyer as a compression charge $0.0075 per thousand cubic feet of gas delivered hereunder, whether such equipment is operated continuously or not; provided, however, that no compression charge shall be made either for (1) gas produced from a well or wells physically capable of delivering such gas hereunder against a pressure of 850 pounds per square inch gauge, or (2) for gas which Buyer is not equipped and prepared to compress and which Seller has compressed and delivered to Buyer at the pressure required by Buyer hereunder. If more than one stage of compression is necessary, then the aforesaid compression charge to be paid to Buyer by Seller shall be $0.015 per thousand cubic feet of gas delivered hereunder. Any compression charges due hereunder may be deducted by Buyer from remittances due Seller hereunder.

(C) Subject to the force majeure clause hereinafter set forth, if a given well is shut in for 75 consecutive days because of Buyer's failure to take delivery of gas from such well and Seller is, throughout said 75-day period, prepared to deliver gas to Buyer from such well under the terms and conditions hereof, then in such event Seller shall

have the right to terminate this contract as to gas thereafter produced from such well, this right to terminate being expressly conditioned, however, as follows:

(1) Seller shall give to Buyer written notice of its intention to so terminate this contract as to such well at least 15 days prior to the date upon which said termination is to be effective, said 15-day period being for the purpose of enabling Buyer to take such steps as may be necessary to enable it to remedy the situation and commence receiving gas from such well under this contract again; and

(2) If Buyer's failure to take delivery of gas from such well is because of the inability of such well to deliver gas at the pressures required by Buyer hereunder, then the aforesaid 75-day period shall, for purposes of this Section, not commence to run until Buyer shall have acquired the right to compress gas from such well, and it is further agreed that the running of the aforesaid 75-day period shall be suspended so long as Buyer engages in good faith efforts to obtain necessary compression equipment and facilities and proceeds with due diligence in the installation of compression facilities necessary to effect deliveries of gas hereunder from such well at the required pressures.

8. *PRICE.*

(A) (1) The price to be paid by Buyer for each one thousand cubic feet of gas delivered hereunder to Buyer, on the basis of measurement and calculations hereinafter provided, shall be as follows:

(a) \$0.06997 from the effective date hereof through May 31, 1955;

(b) \$0.07897 from June 1, 1955, through May 31, 1960;

(c) \$0.08797 from June 1, 1960, through May 31, 1965;

(d) $0.09696 from June 1, 1965, through May 31, 1970;

(e) $0.10596 from June 1, 1970, through May 31, 1975;

(f) $0.11496 during the remainder of the time this agreement shall be in force and effect.

(2) It is recognized that during the existence of the Defense Production Act of 1950 and any amendments, extensions, renewals, and successors thereof the price to be paid by Buyer to Seller for gas delivered hereunder is subject to the rules and regulations of the proper Price Stabilization authorities or any successors thereof (hereinafter for convenience referred to as Office of Price Stabilization). If the above prices payable under the foregoing Paragraph (A) (1) of this Section 8 for production delivered hereunder are now, or at any time hereafter, or from time to time, in excess of a given party seller's "Ceiling Price" as properly determined under and in accordance with any such concurrently effective rules and regulations of the Office of Price Stabilization, then in lieu of the above prices the price to be paid by Buyer to such party seller for production delivered hereunder during so long a period of time as such condition exists shall be such party seller's "Ceiling Price" in effect during said period.

(B) The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquifiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products, it being further understood and agreed, however, that nothing herein is in-

tended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recoverable from the production delivered to Buyer hereunder.

(C) If in accordance with the provisions of Paragraph (B) of Section 4 of this contract, Buyer dehydrates the gas delivered hereunder, then Seller shall pay to Buyer as a dehydration charge the sum of $0.002 for each one thousand cubic feet of gas dehydrated, which dehydration charge may be deducted by Buyer from remittances due Seller hereunder.

(D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact "higher" than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of meas-

urement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

9. *CONDENSATE.* Buyer, or its assign, shall have the option from time to time and upon sixty (60) days' notice, of purchasing all of the free condensate that may be produced from the subject wells and which may be recovered or recoverable by the use of separators operated in connection with such wells, and measured by liquid meter, or liquid gas ratio tests as hereinafter set forth, and shall accept delivery of such condensate into the gas gathering lines or at Seller's option from Seller's storage tanks located on the leases. Buyer, or its said assign, shall deliver to Seller written notice of the exercise of its said option and may discontinue the purchase of condensate by giving Seller sixty (60) days' written notice that it no longer desires to purchase same.

Measurement of condensate delivered into the gathering lines shall be by suitable liquid meter installed and kept in repair by Buyer, or its assign, or by liquid-gas ratio tests, conducted quarterly, as may be agreed upon. Measurement of condensate delivered from Seller's storage tanks shall be governed by the capacities of Buyer's trucks which have

been strapped by a recognized testing concern or by public authority. It is agreed, however, that all condensate volumes shall be weathered to atmospheric pressure, or that as to the condensate delivered into the gas gathering system, shrinkage of the high pressure condensate shall be based upon a shrinkage factor to be determined semiannually, or more often, when in the opinion of either party, a change in the method of the operation of Seller's wells will materially affect such factor. The shrinkage factor shall be determined by the following method: A suitable sample of the high pressure condensate shall be bled out of the separator into a calibrated pressure bomb. Gas from this bomb shall be liberated through a suitable trap for the purpose of accumulating any entrained liquid. After the pressure on the bomb has been reduced to atmospheric pressure and temperature, the remaining liquid therein, plus any liquid accumulated in the trap, shall constitute the weathered volume at the observed temperature attributable to the sample volume. The volume of weathered condensate at the observed temperature shall then be corrected to 60° F. and the difference between this volume and the sample volume divided by the sample volume shall be the shrinkage factor. The foregoing procedure shall be followed until the parties agree on some other mutually agreeable method suitable for the purpose.

Buyer shall pay or cause to be paid to Seller, for condensate received in accordance with the provisions of this Section, the price posted by Buyer or its said assign, as the case may be. Provided, however, that such posted price shall be in line with the prices established by the majority of major oil companies for similar grade condensate in fields in North Louisiana.

10. *TAXES*. Seller shall pay or cause to be paid all existing severance, production, and other excise taxes levied on the production deliverable hereunder up to the point of delivery and Buyer shall pay all existing gathering, trans-

mission, export and sales taxes levied on the gas after its receipt by Buyer. Any increase in sales, transactions, occupation, service, production, severance, gathering, transmission, export or excise taxes, assessments or fees hereafter levied, assessed or fixed by the United States or any state or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes) in addition to or greater than those being levied, assessed, or fixed on the date first above written, if any, in respect of or applicable to the gas to be sold by Seller to Buyer hereunder and for which either party may be liable during any month, either directly, or indirectly through any obligation to reimburse others, are hereafter collectively referred to as an "additional tax". It is expressly understood and agreed between the parties that in the event any such additional tax is levied for which Seller is liable hereunder, then Buyer shall, so long as such additional tax shall be in effect, pay to Seller each month an increase in price sufficient to reimburse Seller for *three-fourths* of such additional tax; and in the event any such additional tax is levied for which Buyer is liable hereunder, then Seller shall, so long as such additional tax shall be in effect, pay to Buyer each month a sum sufficient to reimburse Buyer for *one-fourth* of such additional tax. In the event all or any part of such liability of either party is not determined or determinable by the end of any month, then the accounts of the parties shall be adjusted and settled, in the statement to be rendered by Buyer to Seller by April 1 of the next following year in respect of such additional tax for the calendar year then last ended.

If such additional tax shall amount to more than three ($0.03) cents per thousand cubic feet, then either party by thirty (30) days' written notice to the other may cancel this agreement; provided, however, that in the event of such notice of cancellation the other party may continue the contract by agreeing to assume the economic burden of

that party of the additional tax in excess of such $0.03 increase. For the purpose of this Section 10 only, the basis of measurement of a cubic foot of gas for the purpose of determination of the amount of tax shall be as prescribed by the statute or statutes imposing the tax.

Buyer shall have the right, at Buyer's option, to pay for Seller's account all taxes now or hereafter due and payable by Seller in respect of production received by Buyer hereunder, and may deduct all sums thus paid from remittances to Seller hereunder.

11. *ROYALTY SETTLEMENTS.* Seller shall pay all royalty payments and other production payments, as provided in its leases and assignments thereof, for all production delivered hereunder. Seller agrees to hold Buyer harmless against any and all claims, losses, and damages resulting from payment to Seller for any production delivered hereunder. It is agreed and understood, however, that should Seller so request, Buyer will pay for Seller's account all royalty payments and other production payments as provided in the leases covering the subject properties, such payments to be deducted from remittances to Seller hereunder. It is further understood, however, that Seller shall, when requested by Buyer, furnish Buyer signed division orders upon regular forms of Buyer, directing the payment to the proper parties of such amounts as may be due for royalties and other production payments and shall furnish Buyer transfer orders from time to time, as required, upon the regular forms of Buyer.

12. *ADDRESSES OF PARTIES.* Notices and payments hereunder may be given or mailed to each party seller at the address set forth by the signature of such party.

Notices and payments hereunder may be given or mailed to Buyer at the following address:

Arkansas Louisiana Gas Company
Slattery Building
Shreveport, Louisiana.

Either party may by written notice to the other provide for a changed address to which payments and notices shall thereafter be given or mailed.

13. *GENERAL TERMS AND CONDITIONS.* Reference is hereby made for all purposes to additional terms and conditions of this gas purchase contract, which are attached as a supplement hereto, identified herewith, and hereby made part hereof.

14. This agreement has been prepared in multiple counterparts to facilitate its execution by all parties seller owning interests in the subject properties, and it is agreed that all such counterparts, each executed by one or more of the parties seller, shall constitute but one and the same contract to the same extent as though all such parties seller had joined in the execution of the same document.

In Witness Whereof this instrument is executed by Buyer as of the day and year first above set forth and executed by the parties seller as of the dates set forth below by their respective signatures.

Arkansas Louisiana Gas Company

By /s/ A. H. Weyland
President

Witness:

/s/ Helen M. Weigand
/s/ Carey R. Meredith

Attest: /s/ T. J. Heard
Secretary

Seller

/s/ D. B. McDonnell
Execution Date: Jan. 4th, 1952
Address: 293 Leo Ave.
Shreveport, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

/s/ Palmer R. Long
Execution Date: 1 - 4 - 52
Address: 227 Carrollton
Shreveport, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

/s/ Harry L. Viser, Jr.
Execution Date: Jan. 4, 1952
Address: 6712 Querbes Dr.
Shreveport, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

M[illegible] Trust
/s/ [illegible]ry L. Viser, Jr., Trustee
Execution Date: Jan. 4, 1952
Address: 2634 Lydia St.
Baton Rouge, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

R. M. L. Trust by
/s/ Palmer R. Long, Trustee
Execution Date: 1 - 4 - 52
Address: 104 Fairfield Bldg.
Shreveport, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

/s/ Earle J. Christenberry
Execution Date: Jan. 5, 1952
Address: 822 Perdido Street
New Orleans 12, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens

/s/ Seymour Weiss
Execution Date: Jan. 5th, 52
Address: Roosevelt Hotel
New Orleans, La.

Witness:

/s/ Mrs. W. D. Smith
/s/ Hugh M. Stephens
/s/ Jim O. Logan

/s/ James A. Noe
Execution Date: Jan. 6th, 1952
Address: Radio Station KNOE
Monroe, Louisiana

Witness:

/s/ Lillian B. Jefferson
/s/ Hugh M. Stephens

/s/ J. R. Bozeman
Execution Date: Jan. 25, 1952
Address: 1903 W. Tenn.
Midland, Texas

Witness:

/s/ Clovis G. Chappell, Jr.
/s/ ? ? ? ? Frezze

/s/ W. E. Hall, Jr.
Execution Date: Jan. 25, 1952
Address: P.O. Box 151
DeRidder, Louisiana

Witness:

/s/ W. F. Weber
/s/ Lou Ella Martin

State of Louisiana,
Parish of Caddo

Before Me, the undersigned authority, this day personally came and appeared Hugh M. Stephens, to me personally known to be the identical person whose name is subscribed as an attesting witness to the above and foregoing instrument, and upon being duly sworn, did depose and say:

That he subscribed his name to said instrument, and that he knows D. B. McConnell, Palmer R. Long, Harry L. Viser, Jr., who signed individually and as Trustee of the M & T Trust, Palmer R. Long, Trustee of the R. M. L. Trust, Earle J. Christenberry, Seymour Weiss, and James A. Noe, and saw them sign the same of their own free will, for the purposes and considerations therein expressed.

/s/ Hugh M. Stephens

Sworn to and Subscribed before me this 7th day of January, 1952.

/s/ William L. Murdock
Notary Public

STATE OF TEXAS,
COUNTY OF MIDLAND

On this 25th day of January, 1952, before me personally appeared J. R. Bozeman, to be known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed it as his free act and deed.

/s/ JENNIE ANN KYLE
Notary Public in and for
Midland County
State of Texas

State of Louisiana,
Parish of Beauregard

On this 25th day of January, 1952, before me personally appeared W. E. Hall, Jr., to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed it as his free act and deed.

/s/ Allen R. LeCompte
Notary Public in and for
Beauregard Parish
State of Louisiana

CORPORATION ACKNOWLEDGEMENT

STATE OF LOUISIANA,
PARISH OF CADDO

On this 11th day of January, 1952, before me appeared A. H. WEYLAND, to me personally known, who, being by me duly sworn, did say that he is President of Arkansas Louisiana Gas Co., and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said A. H. WEYLAND acknowledged said instrument to be the free act and deed of said corporation.

/s/ H. M. LEWIS, JR.
Notary Public in and for
Caddo Parish
State of Louisiana

GAS PURCHASE CONTRACT

General Terms and Conditions

SUPPLEMENT

LOUISIANA

The terms and conditions in this supplement constitute part of the foregoing gas purchase agreement dated January 11, 1952, covering properties in the State of Louisiana in Sligo Field, Bossier Parish executed by and between Arkansas Louisiana Gas Company as the party Buyer and the following parties, if more than one, collectively referred to as Seller:

D. B. McConnell, et al

I. *BASIS OF MEASUREMENT*. Gas sold and delivered under this agreement shall be measured, calculated, purchased, and accounted for, as between the parties hereto, on the basis of a standard cubic foot of gas, at a pressure of 15.025 pounds per square inch absolute and at a temperature of 60° F., all as defined in and as determined under the Louisiana Standard Gas Measurement Law of 1950 and the rules and regulations promulgated pursuant thereto by the Louisiana state regulatory body having jurisdiction. The unit of measurement for gas hereunder shall be one thousand (1,000) standard cubic feet of gas, sometimes herein referred to as MCF.

II. *MECHANICS OF MEASUREMENT.*

(A) *The specific gravity* of gas delivered hereunder shall be periodically determined by Buyer, as often as is found necessary in practice, by a method of test generally acceptable to the industry, provided that such tests shall be preceded by reasonable notice to Seller in order that Seller may have a representative present.

(B) *The temperature* of gas delivered hereunder shall, at Buyer's option (but always subject to requirements of law), be:

(a) determined by means of a recording or indicating thermometer of a standard manufacture generally acceptable to the industry, and so installed by Buyer that it may properly record the temperature of the gas flowing through the meter or meters; or

(b) assumed to be the temperature which any regulatory body with jurisdiction announces as being the average temperature of gas produced from the well or wells subject hereto; or

(c) assumed to be 60° Fahrenheit.

(C) *The pressure and volume* of gas delivered hereunder shall be determined by standard type orifice metering equipment with flange connections installed and operated by Buyer at the point or points of delivery hereunder in accordance with the specifications prescribed in Gas Measurement Report No. 2, dated May 6, 1935, of the Natural Gas Department of the American Gas Association, as the same may be amended from time to time, or by any other method agreed upon between the parties hereto; and it is hereby agreed that the values of the Reynolds number factor and the expansion factor shall be assumed to be one (1). Seller shall have access to the metering equipment at all reasonable times, but calibrations and adjustments thereof and changing of charts shall be done by the employees or agents of Buyer. Buyer shall change the charts daily, or as often as is found necessary in practice, and shall keep said meters accurate and in repair. The meters shall be tested and calibrated periodically by Buyer, as often as is found necessary in practice, provided that such tests shall be preceded by reasonable notice to Seller, in order that Seller may have a representative present. Seller may challenge the accuracy of any meter, and if, after testing, such meter is found by Buyer to be inaccurate to

the extent of two (2%) per cent, plus or minus, Buyer shall repair the meter and make the necessary volume corrections, based on the extent of the inaccuracy, for the time during which the meter has been inaccurate, provided that in no event shall corrections extend back beyond the close of the preceding accounting month. If the meter, when challenged, is found to accurate within two (2%) per cent, plus or minus, then the cost of the test shall be borne by Seller. If, for any reason, any meter shall be out of service or out of repair so that the amount of gas delivered cannot be ascertained or computed from the reading thereof, then the gas delivered during the period the meter is out of service or out of repair shall be estimated and agreed upon by the parties upon the basis of the best data available, using the first of the following methods which is feasible: (a) By correcting the error if the percentage of error is ascertainable by calibration, test, or mathematical calculation; (b) By using the registration of any check meter installed and accurately registering; (c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately. The charts and records from the metering equipment shall remain the property of Buyer, and shall be kept on file by Buyer for a period of at least one year, after which time they may, at Buyer's option, be destroyed. Upon request of Seller, Buyer shall submit the said charts and records from the metering equipment to Seller, together with calculations therefrom, for Seller's inspection and verification, subject to return within twenty (20) days from receipt thereof. Seller, at Seller's option and at Seller's cost and expense, may install and operate check metering equipment of substantially similar type to that operated by Buyer hereunder to check Buyer's measurements of gas delivered hereunder.

III. *QUALITY OF PRODUCTS.* The natural gas delivered hereunder shall contain not more than thirty grains of sulphur per hundred cubic feet of gas and not more than

one (1) grain of hydrogen sulphide per hundred cubic feet of gas, and shall be free of objectionable liquids and solids, oxygen, and other deleterious substances. The gas shall have an average B.T.U. content of at least 950 B.T.U. per cubic foot. Buyer shall be under no obligation to accept delivery of any gas hereunder which either does not conform to the standards of quality and heat content herein set forth or contains corrosive products in quantities sufficient to impair the useful life of Buyer's pipeline facilities or of any gasoline or other processing plant processing the gas delivered.

IV. *OPERATION OF WELLS.* Seller, at Seller's expense, shall:

(A) Complete, control, manage, operate, and maintain the wells subject hereto in a workmanlike manner;

(B) Install, operate, and maintain on each well such separators, heaters, and other equipment as may be necessary to deliver gas under the terms and conditions of this contract;

(C) Equip, operate, and regulate the pressures on, each of the wells subject hereto in such manner that the pressure and volume of the gas delivered hereunder can be regulated in a safe and satisfactory manner;

(D) Regulate the volume of gas deliveries hereunder in accordance with the instructions of Buyer's gas dispatcher or representative in the area;

(E) Conduct with Buyer's cooperation, or at Buyer's option, cooperate with Buyer who shall conduct, such well tests as Buyer may require from time to time, but not oftener than once each six months, to determine the open flow and rock pressure of the wells subject hereto, provided that in no event shall any liability attach to Buyer in connection with the making of any such tests except through the negligence of Buyer's agents.

(F) Keep as many attendants stationed in the area covered by this contract as may be necessary in order that the obligations assumed by Seller hereunder may be efficiently performed at all times.

V. *EASEMENTS AND SERVITUDES.* Buyer, or its assign, shall, insofar as Seller is able to convey such rights, have an easement and servitude on the premises covered hereby for installing, operating, and maintaining pipelines and equipment, and for any other purpose connected with the performance of this contract, with the right to remove such lines and equipment before or within a reasonable time after the expiration of this contract. For any purpose connected with this agreement Buyer's representative shall have free access to any part of Seller's leases.

VI. *WARRANTY OF TITLE.* Seller hereby warrants title to the gas and any other products delivered hereunder (all being herein referred to as "production") and the right of Seller to sell the same and agrees to defend title as against all persons whomsoever. Seller further warrants that all such production is free from all liens and adverse claims, including liens to secure payment of production taxes, severance taxes, and any other taxes. Seller shall always bear the economic burdens arising from all royalties due and payments to the mineral and royalty owners under Seller's leases and other documents as may appear of record or otherwise be binding upon Seller in accordance with the terms of the respective leases, as well as settlements with all other persons having an interest in the production sold hereunder, and Seller agrees to indemnify Buyer and save it harmless from all suits, actions, debts, accounts, damages, costs, losses, and expenses arising from or out of adverse claims of any or all persons to or against said production. In the event any adverse claim of any character whatsoever is asserted in respect to any of said production, Buyer may retain an amount, as security for the performance of Seller's obligations with re-

spect to such claim under this contract, out of monies then or thereafter payable to Seller hereunder, up to the amount of such claim, without interest, until such claim has been finally determined or until Seller shall have furnished bond to Buyer in an amount and with sureties satisfactory to Buyer and conditioned for the protection of Buyer with respect to such claim.

VII. *PAYMENTS.* Buyer's accounting month is from 7:00 A.M. the 26th day of one calendar month to 7:00 A.M. the 26th day of the following calendar month. Payments for production (said term including gas and any other products sold hereunder) sold and delivered hereunder shall be made by Buyer not later than the 20th day of each calendar month for production delivered during the preceding accounting month. At the time of the payment a statement of the full details of the accounts as to each delivery point hereunder shall be transmitted to Seller accompanying Buyer's check in payment therefor.

VIII. *GOVERNMENT REGULATIONS.* This agreement is and shall be subject in all things to all relevant present and future state and federal laws, and all rules, regulations, and orders of any regulatory authority having jurisdiction in the premises. Neither party shall be held in default for failure to perform hereunder if such failure is due to compliance with such laws, rules, regulations, or orders.

IX. *FORCE MAJEURE.* In the event either party hereto is rendered unable wholly or in part by force majeure to carry out its obligations under this agreement, other than to make payments due hereunder, it is agreed that, on such party's giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied upon, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so

caused, but for no longer period, and such cause shall, as far as possible, be remedied with all reasonable dispatch. The term "force majeure", as employed herein, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides , lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of gas wells, any act or omission on the part of any purchaser or purchasers of gas from Buyer by reason of force majeure affecting such purchaser or purchasers, and any other causes, whether of the kind herein enumerated or otherwise, which are not within the control of the party claiming suspension, and which by the exercise of due diligence such party is unable to overcome, provided that the exercise of due diligence shall never require the settlement of labor disputes against the better judgment of the party having the dispute.

X. *TERMINATION PROCEDURE ON DEFAULT.* If either party shall fail to perform any of the covenants or obligations imposed upon it under and by virtue of this contract (except where such failure shall be excused under the provisions hereof), the other party may, at its option, terminate this contract by proceeding as follows: The party not in default shall cause a written notice to be served on the party in default, stating specifically the cause for terminating this contract and declaring it to be the intention of the party giving the notice to terminate the same; thereupon the party in default shall have thirty (30) days after the service of the notice in which to remedy or remove the cause or causes stated in the notice for terminating the contract, and, if within said period of thirty (30) days, the party in default does so remedy and remove said cause or causes and fully indemnify the party not in default for

any and all consequences of such breach, then such notice shall be withdrawn and this agreement shall continue in full force and effect. In case the party in default does not so remedy and remove the cause or causes and does not indemnify the party giving the notice for any and all consequences of such breach, within said period of thirty (30) days, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of this agreement pursuant to the provisions of this Section shall be without prejudice to the right of the party not in default to collect any amounts then due it and without waiver of any other remedy to which the party not in default may be entitled for violation of this contract.

XI. *SUCCESSORS AND ASSIGNS.* Benefits and obligations of this agreement shall extend to and be binding upon the successors and assigns of the parties, and shall constitute covenants running with Seller's lands and leases subject hereto. It is provided, however, that no conveyance of any interest in the properties subject hereto shall be binding upon Buyer until Buyer shall have been furnished with written notice thereof and a certified copy of records showing such conveyance.

XII. *FAIR LABOR STANDARDS ACT.* Seller hereby warrants that production sold and delivered and to be sold and delivered hereunder has been and will be produced and handled in compliance with the requirements of the Fair Labor Standards Act of 1938, and any amendments thereto, and all other Federal, State, and Municipal laws, rules, and regulations.

Exhibit "A" to the Foregoing Gas Purchase Contract Executed by Arkansas Louisiana Gas Company as the Party Buyer on the ___ Day of ___________, 1952, Covering Production From the Sligo Gas Field, Bossier Parish, Louisiana.

Sellers are the owners of oil, gas, and mineral leases covering lands in the Sligo Gas Field in Bossier Parish, Louisiana, described as:

1. NE/4 and E/2 of E/2 of NW/4, Sec. 17, T 17 N, R 11 W—with the producing gas well thereon known as Independent Oil and Gas Company's Pettit #1 Well.
2. NW/4 of SW/4, and E/2 of NW/4, Sec. 5, T 17 N, R 11 W—with the producing gas well thereon known as Independent Oil and Gas Company's Edwards #1 Well.
3. N/2 of NE/4 of NE/4, and NW/4 of NE/4, Sec. 20, T 17 N, R 11 W, less five acres in NE corner of NE/4—with the producing gas well thereon known as Independent Oil and Gas Company's Porter #1 Well.
4. SE/4 of Sec. 20, T 17 N, R 11 W—with the producing gas well thereon known as Independent Oil and Gas Company's Thompson Unit #1 Well.
5. E/2 of NE/4, Sec. 6, and W/2 of NW/4 Sec. 5, T 17 N, R 11 W—with the producing gas well thereon known as Rose McConnell Long, et al, Edwards Unit #1 Well.
6. S/2 of NE/4 of NE/4, and SE/4 of NE/4, and SW/4 of NE/4, Sec. 20, T 17 N, R 11 W—with the producing gas well thereon known as J.R. Bozeman, Trustee, McDade, et al, #1 Well.
7. S/2 of SW/4, Sec. 32, T 18 N, R 11 W—with the producing gas well thereon known as D. B. McConnell's J. L. Chandler #1 Well.

8. E/2 of SW/4 and SW/4 of SW/4, Sec. 5, and SE/4 of NW/4, Sec. 8, T 17 N, R 11 W—with the producing gas well thereon known as D. B. McConnell's S. L. Herold Unit #1 Well.

9. N/2 of SW/4, SE/4 of NW/4, and SW/4 of NE/4, Sec. 32, T 18 N, R 11 W—with the producing gas well thereon known as D. B. McConnell's Continental-Securities Unit #1 Well.

For the purpose of determining developed and productive acreage it is agreed that the Edwards Estate Lease shall be given 98 acres in the Jeter Zone, and 67 acres in the Pettit Zone. Continental-Securities Lease to be given 135 acres in the Jeter Zone.

[Map deleted from Joint Appendix]

P-45

Filed in Evidence in Suit No. 225699, September 27, 1976

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Serial BLM-A 054491 (Louisiana)

Protective Lease of Oil and Gas Lands Under Authority of Section 441, Revised Statutes (5 U.S.C. 405)

THIS INDENTURE OF LEASE, entered into, in triplicate, and to take effect as of February 1, 1961 by and between the UNITED STATES OF AMERICA, through the Secretary of the Interior, hereinafter called the lessor, and Union Producing Company

P. O. Box 1407
Shreveport, Louisiana

party of the second part, hereinafter called the lessee, under the supervisory authority of said Secretary and subject to the provisions of Public Land Order Nos. 701 and 2178.

WITNESSETH:

SECTION 1. *Rights of Lessee.*—That the lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits owned by the lessor except helium gas in or under the following-described tracts of land situated in the Barksdale Air Force Base East Reservation, Bossier Parish, Louisiana:

Parcel No. 3

T. 17 N., R. 12 W., Louisiana Meridian
Sec. 1, All
Sec. 2, All
Sec. 3, All
Sec. 4, All

containing 2419.30 acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures under the conditions herein specified, as may be necessary to the full enjoyment thereof, for a period of 5 years and so long thereafter as oil or gas is produced in paying quantities; Provided, that this lease shall not be deemed to expire by reasons of suspension of prospecting, drilling, or production pursuant to any order or consent of the Secretary of the Interior.

SEC. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) *Bonds.*—To furnish and maintain at all times as required by the lessor a bond in the penal sum of $10,000.00 with approved corporate surety, or with deposit of United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(b) *Drilling agreement or unit plan.*—Within 30 days of demand to subscribe to and operate under such reasonable communitization or drilling agreement, or under such reasonable cooperative or unit plan, embracing all or a portion of the lands included herein as the Secretary of the Interior may determine to be practicable and necessary or advisable, which agreement or plan shall adequately protect the rights of all parties in interest, including the United States, and which shall modify the terms hereof to the extent provided in such agreement or plan.

(c) *Wells.*—See Insert A.

(d) *Rentals and royalties.*—See Insert B.

(4) At the option of the lessor to pay the respective royalties herein provided for in value or in amount of production. If paid in value such royalties shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. If paid in

amount of production the respective royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and at such shipping point as may be designated by the lessor, or in the case of crude oil, in such tanks provided by the lessee as reasonably as may be required by the lessor, but in no event shall the lessee be required to hold royalty oil or other royalty products in storage beyond the last day of the calendar month next following the calendar month in which produced. The lessee shall not be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which it has no control.

(5) It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas; due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters and, whenever, appropriate, after notice and opportunity to be heard.

(6) Royalties shall be subject to reduction on the entire leasehold or on any portion thereof segregated for royalty purposes if the Secretary of the Interior finds that the lease cannot be successfully operated upon the royalties fixed herein, or that such action will encourage the greatest ultimate recovery of oil or gas or promote conservation.

(e) *Contracts for disposal of products.*—To file with the Oil and Gas Supervisor of the Geological Survey not later than 30 days after the effective date thereof, any contract, or evidence of other arrangement, for the sale or disposal of oil, gas, natural gasoline, and other products of the leased land; provided, that nothing in any such contract or other arrangement shall be construed as modifying any of the

provisions of this lease, including, but not limited to provisions relating to gas waste, the Government's option to purchase gas; taking royalty in kind, and the method of computing royalties due as based on a minimum valuation, and in accordance with the operating regulations.

(f) *Statements, plats, and reports.*—At such times and in such form as the lessor may prescribe, to furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amounts used for production purposes or unavoidably lost; a plat showing development work and improvements on the leased lands and a report with respect to stockholders, investment, depreciation, and costs.

(g) *Well records.*—To keep a daily drilling record, a log, and complete information on all well surveys and tests in form acceptable to or prescribed by the lessor of all wells drilled on the leased lands, and an acceptable record of all subsurface investigations affecting said lands, and to furnish them, or copies thereof to the lessor when required.

(h) *Inspection.*—To keep open at all reasonable times for the inspection of any duly authorized officer of the Department, the leased premises and all wells, improvements, machinery, and fixtures thereon and all books, accounts, maps, and records relative to operations and surveys or investigations on the leased lands or under the lease.

(i) *Payments.*—Unless otherwise directed by the Secretary of the Interior, to make rental, royalty, or other payments to the lessor, to the order of the United States Geological Survey, such payments to be tendered as directed by the Oil and Gas Supervisor of the Geological Survey.

(j) *Diligence—Prevention of waste—Health and safety of workmen.*—To exercise reasonable diligence in drilling

and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the lessor; to carry on all operations in accordance with approved methods and practice as provided in the operating regulations, having due regard for the prevention of waste of oil or gas or damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations, and for the health and safety of workmen and employees; to plug properly and effectively all wells before abandoning the same; to carry out at expense of the lessee all reasonable orders of the lessor relative to the matters in this paragraph, and that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the lessee's cost; Provided, that the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(k) *Taxes and wages—Freedom of purchase.*—To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(l) *Nondiscrimination.*—In connection with the performance of work under this lease, the lessee agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The lessee

agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

The lessee further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

(m) *Assignment of oil and gas lease or interest therein.*—To file with the lessor within 90 days from the date of final execution any instrument of transfer made of this lease, or any interest therein, such instrument to take effect upon its final approval by the Bureau of Land Management, as of the first day of the lease month following the date of filing. Upon an assignment of all or part of the record title to a portion of the acreage in this lease, the terms hereof shall apply separately to the segregated tracts.

(n) *Pipe lines to purchase or convey at reasonable rates and without discrimination.*—If owner, or operator, or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States.

(o) *Reserved deposits.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(p) *Overriding royalties.*—To limit the obligation to pay overriding royalties or payments out of production in excess of 5 percent to periods during which the average production per well per day is more than 15 barrels on an entire leasehold or any part of the area thereof or any zone segregated for the computation of royalties.

(q) *Deliver premises in cases of forfeiture.*—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease; but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

(r) *Use and Protection of Property.*—See Insert C.

(s) *Damage to property.*—To pay the lessor or his tenant, as the case may be, for any and all damage to or destruction of property caused by lessee's operations hereunder; to save and hold the lessor harmless from all damage or claims for damage to persons or property resulting from the lessee's operations under this lease.

(t) *Restoration of surface of land.*—Upon any partial or total relinquishment, cancellation or expiration of lease, lessee shall, as to that part of the leased land as to which his rights have terminated, and to the extent deemed necessary by the lessor fill all sump holes, ditches and other excavations, remove or cover all debris, and shall, so far as reasonably possible, restore the surface of the leased land to its former condition.

(u) *Local agent.*—To appoint and maintain at all times during the term of this lease an agent upon whom may be served written orders or notices respecting matters contained in this section, and within 15 days after the date of this lease to inform the Oil and Gas Supervisor, in writing, the name and address of such agent. If a substitute agent is appointed, lessee shall immediately so inform the said official.

(v) *Water wells.*—In case the lessee strikes water while drilling instead of oil or gas or abandons a well drilled as a water well, the right to purchase the casing in any such well at the reasonable salvage value thereof is expressly reserved by the United States.

(w) *Oil and gas Operating Regulations.*—To comply with and operate in accordance with the provisions of the Oil and Gas Operating Regulations (30 CFR, Part 221), to the extent that such regulations are not inconsistent with the specific terms hereof.

SEC. 3. The lessor expressly reserves:

(a) *Rights reserved—Easements and rights-of-way.*—The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same and other Government lands and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of any of the lands embraced within this lease which are owned by the United States under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(c) *Monopoly and fair prices.*—Full power and authority to promulgate and enforce all orders necessary to insure the sale of the production of the leased lands to the United States and to the public at reasonable prices, to protect the interests of the United States, to prevent monopoly, and to safeguard the public welfare.

(d) *Helium.*—The ownership and the right to extract helium from all gas produced under this lease, subject to such rules and regulations as shall be prescribed by the

Secretary of the Interior. In case the lessor elects to take the helium the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor at any point on the leased premises in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof. The lessee shall not suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which he is not reasonably compensated, save for the value of the helium extracted. The lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

SEC. 4. *Drilling and producing restrictions.*—It is covenanted and agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. After unitization, the Secretary of the Interior, or any person, committee, or State or Federal officer or agency so authorized in the unit plan, may alter or modify from time to time, the rate of prospecting and development and the quantity and rate of production from the lands covered by this lease.

SEC. 5. *Surrender and termination of lease.*—The lessee may surrender this lease or any legal subdivision thereof by filing with the proper land office of the Bureau of Land Management a written relinquishment, in triplicate, which shall be effective as of the date of filing subject to the

continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to place all wells on the land to be relinquished in condition for suspension or abandonment in accordance with the regulations and the terms of the lease, to be accompanied by a statement that all wages and moneys due and payable to the workmen employed on the land relinquished have been paid.

SEC. 6. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within 3 months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen; pending such selection all equipment shall remain in normal position. If the lessor, or another lessee, shall not within 3 months elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within a period of 90 days thereafter to remove from the premises all the material, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells. Any materials, tools, machinery, appliances, structures, and equipment, including casing in or out of wells on the leased lands, shall become the property of the lessor, on expiration of the period of 90 days above referred to or such extension thereof as may be granted on account of adverse climatic conditions throughout said period.

SEC. 7. *Preference of Government to purchase gas.*—Any executive department of the Government shall have the option to purchase at the market price on the date of sale up to 50 percent, or such greater percentage as may be agreed upon, of the gas produced and saved from the leased premises after 6 months advance notice to the lessee by the Secretary of the Interior; provided, such gas is not being utilized for repressuring or secondary recovery purposes for the benefit of this lease.

SEC. 8. *Heirs and successors in interest.*—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 9. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of Section 3741 of the Revised Statutes of the United States, and Sections 431, 432, and 433, Title 18, United States Code, relating to contracts, enter into and form a part of this lease as the same may be applicable.

IN WITNESS WHEREOF:

THE UNITED STATES OF AMERICA

/s/ By: ILLEGIBLE
Director, Bureau of Land Management
Date January 23, 1961

LESSEE:

UNION PRODUCING COMPANY
/s/ By: ILLEGIBLE
Executive Vice President

ATTEST:

/s/ By: ILLEGIBLE
Secretary

Witnesses:

/s/ ILLEGIBLE

/s/ ILLEGIBLE

[Map deleted from Joint Appendix]

INSERT A

(c) *Wells.*

1. On the parcel, or on each of the parcels (as described in the notice of sale hereof) embraced by this lease if there be more than one parcel, to commence the drilling of a well within 60 days from the effective date hereof and to commence the drilling of a second well within 120 days from the effective date hereof, one of which wells shall be drilled to production or abandonment at a depth sufficient to test the Cotton Valley "D" sand.

2. Within thirty days after completion of the first of either of the wells required under subsection 1 hereof, to proceed with the drilling of additional wells until the leased lands have been adequately protected from drainage caused by production of oil or gas from wells on other lands producing from the Cotton Valley "D", Travis Peak, Pettit, Anhydrite, and Jeter or other zones unless it can be shown to the satisfaction of the Director of the Geological Survey that the drilling of any such well would not be economically warranted. Drilling of each well under this subsection shall be commenced within 30 days after completion of each preceding well.

3. Within six months of the effective date hereof, and provided this lease embraces parcel 4 as described in the notice of sale hereof, to commence the drilling of a well to offset the producing oil wells situated on lands adjoining the south boundary of the parcel and if it obtains production in paying quantities, to drill such additional wells as reasonably may be required by the Oil and Gas Supervisor to insure adequate development of the oil deposits within said parcel.

4. At the election of the lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, which is authorized and sanctioned by applicable law or by the Secretary of the Interior.

5. The Oil and Gas Supervisor of the Geological Survey may grant an extension of time, not to exceed 60 days, to commence the drilling of any of the wells provided for in subsections 1 and 2 hereof when conditions beyond the control of the operator preclude timely commencement, or for other valid reasons.

INSERT B

(d) *Rentals and Royalties.*

1. To pay the lessor annually in advance, effective the first day of the month in which the lease issues, as and for rental, the sum of one dollar per acre or fraction thereof per year on all of the acreage covered by this lease at the beginning of any rental period, such annual payments to be made only for those lease years commencing prior to a discovery of oil or gas in paying quantities on the leased land.

2. To pay the lessor a royalty of 16 2/3 per cent of the amount or value of production obtained and saved from the leased land. Also, to pay an additional royalty of 8 1/3 per cent of the value of production until there has been paid as such additional royalty an amount equivalent to $500 an acre for the total number of acres contained in this lease at time of issuance, such number being that cited in Section 1 hereof. In computing such royalty on gasoline or other products extracted from gas or on gas remaining after extraction of such products, no allowance will be made for the cost of gathering, boosting, transportation, extraction, or processing.

3. To pay the lessor, in lieu of rental at the expiration of each lease year beginning after a discovery of oil or gas on the leased lands, a minimum royalty of one dollar per acre or fraction thereof, or if there is production, the amount, if any, that such minimum royalty exceeds royalties on production.

INSERT C

(r) *Use and Protection of Property.*

1. Location of each proposed well or well road, storage area, pipeline, or other installation, will be subject to Base Commander's approval prior to commencement of drilling operations or construction.

2. Lessee will maintain all existing roads utilized by his operations at no cost to the Government. Such roads will be kept serviceable and in good condition at all times.

3. Maximum height of derricks will be limited to 150 feet above the surface of the ground.

4. When required by the Base Commander, all completed well areas, storage areas and allied facilities will be enclosed with a minimum 36-inch wire-mesh fence utilizing steel posts. Fence around well area, and area itself, will be kept neat and well maintained. Area to be fenced will be kept at a minimum required to safeguard the installation and will not exceed a 100-foot radius from edge of well or construction.

5. Portable reserve and drilling mud tanks will be provided when required by the Base Commander.

6. Drilling will not be permitted in lakes, streams, or ponds, and no waste oil, salt water, or other contamination will be permitted to drain into lakes and streams.

7. Destruction and disturbance of plant and wildlife will be kept to a minimum.

8. In no case will drilling operations be permitted in the area delineated on Exhibit "A" for the Com-

bat Operations Center until location of this facility is firmly established.

9. Drilling operations will not be permitted nearer than 1,000 feet to structures and operational facilities and 2,500 feet from housing areas and antenna farms. This distance may be increased or decreased if deemed advisable by the Base Commander.

10. All operations must be conducted in regard to good land management; market value will be paid for timber cut or destroyed; the Barksdale Air Force Base Commander will determine if lessee is to pay market value for damaged timber, or if the lessee is to cut and stack the timber for retention as Government property.

11. The lessee will abide by all Barksdale Air Force Base security regulations and requirements.

12. Maintenance and repairs to Government fences adjoining the leased area will be a responsibility of lessee and shall be kept in a serviceable condition at all times at no cost to the Government.

13. The lessee shall provide and maintain appropriate fire lanes next to existing and proposed Government-owned fences.

14. Multiple completions shall be utilized, where feasible, to minimize the number of wells required for adequate development. When required, derricks will be removed upon completion of the well.

15. Lessee must pay the Government or his tenant for all damages to or destruction of property caused by lessee's operations; to hold the Government harmless from all damage or claims for

damage to persons or property resulting from the lessee's operations.

16. Housing will not be established without showing necessity and then only with specific approval by the Base Commander.

P-58

Filed in Evidence in Suit No. 225699, September 27, 1976

ARKANSAS LOUISIANA GAS COMPANY

INTERNAL CORRESPONDENCE

Shreveport, Louisiana

November 20, 1961

To: Mr. J. C. Templeton

From: B. E. Harrell

Subject: U.S.A. Lease—Sligo

In answer to your letter of November 17, 1961, concerning royalty price applicable to the above lease, this is to advise that I have no particular opinion as to what price should be paid to royalty owners by ALG in this field. However, I do wish to caution you that we have a favored nations contract with W. E. Hall et al in this field and the price they are receiving is presently \$0.08797 per MCF. I do not know whether our paying any royalty owner a higher price than \$0.08797 would activate this favored nations clause; however, if the attorneys feel that there is no danger of a royalty price activating a favored nations clause, then I have no objection to paying the Government at a price susbstantially higher than \$0.08797.

I wanted to bring this out, however, since any activation of favored nations clauses in this area would cost ALG several million dollars increase in cost of gas annually.

/s/ BILL

BEH:dm
cc: Mr. D. W. Weir
Mr. Robert Roberts, Jr.

Xerox: J. G. Cooke, Jr.
W. A. Stewart
D. E. Sullenberger

P-62

Filed in Evidence in Suit No. 225699, September 27, 1976

ARKANSAS LOUISIANA GAS COMPANY
INTERNAL CORRESPONDENCE

December 27, 1961

To: Mr. John W. Denhollem

From: Robert Roberts, Jr.

Subject: Operating Agreement—Barksdale Field Lease, Sligo Area, Bossier Parish, Louisiana.

This is in response to your memorandum of December 18, 1961, requesting my comment on recent correspondence concerning the effort to agree on a balancing provision (Section 3) for the Operating Agreement of February 1, 1961.

After our telephone conversation yesterday I find that in my file is a copy of the amendment submitted by Mississippi River Fuel Corporation with their letter of June 14, 1961. Shortly afterward I commented on Mississippi River's draft and send you herewith a copy of my memorandum to you of July 25th in that connection. I do not know that there is anything that I can add to the comments I made in that letter.

Texas Gas' letter of December 13th emphasizes the difficulty of the problem and the difference in point of view of the various parties: You do not want to buy any gas or set a price, and obviously several of the parties want to do just that.

As requested, your file is returned herewith.

Very truly yours,

/s/ ROBERT ROBERTS, JR.

Encs-
RRJr:m
cc—Messrs. J. C. Templeton
M. C. Bubenzer
J. C. Cooke, Jr.

P-65

Filed in Evidence in Suit No. 225699, September 27, 1976

UNITED STATES

DEPARTMENT OF THE INTERIOR

GEOLOGICAL SURVEY

521 Wright Building
115 West 3rd Street
Tulsa 3, Oklahoma

March 27, 1962

Arkansas Louisiana Gas Company
P. O. Box 1734
Shreveport 4, Louisiana

Attention: Mr. J. C. Templeton

Gentlemen:

Subject: Lease BLM-A-054491, your file No. 15161, Mississippi River Fuel Corporation, et al., U.S.A. Lease (Parcel 3), Sligo Field, Bossier Parish, Louisiana

We refer to your letter of January 17, 1962, with which you submitted a "Royalty Settlement Plan" for the subject lease.

You have proposed settlement for gas royalty on the volume of gas produced, less plant fuel and shrinkage, at a value of $0.08547 per MCF calculated on a pressure base of 15.025 p.s.i.a. We will allow deduction for normal plant fuel and shrinkage, but we do not regard the proposed price for gas produced from this lease as a reasonable value in a fair and open market.

The lowest price being received for gas from this lease is for that sold under a contract which provides a price of $0.117432 until January 1, 1962; $0.130252 until January 1, 1967; and $0.140508 thereafter at a pressure base of

15.025 p.s.i.a. We plan to compute the value of the Government's royalty interest in gas delivered into your pipeline system, until further notice, at the prices paid under the contract cited above, unless you can show valid reasons why the proposed price exceeds the fair value of the gas in a free and open market.

Very truly yours,

/s/ J. R. Reeve
J. R. Reeve
Regional Oil and
Gas Supervisor

Natural Gas and Oil Co.
1315 Richards Bldg.
New Orleans, Louisiana

P-77

Filed in Evidence in Suit No. 225699, September 27, 1976

UNITED STATES GOVERNMENT

MEMORANDUM

Date: 10-22-62

To: Files

From: N. Orvis Frederick

Subject: BLM-A-054491, Sligo field, Louisiana

J. C. Templeton, Vice President, Arkansas-Louisiana Gas Company, Shreveport, came in at 9:30 on Friday, October 19, 1962, to discuss the $34,723.45 deficit (as of 8-1-62) in royalty payments, mostly due to their 8.547¢ per MCF value placed on gas taken in kind being below reasonable value and below all sales from the same lease by their co-lessees.

Mr. Templeton is aware of the higher prices being paid for 85% of the gas from this lease, but maintained Ark-La is buying a great deal of gas from other producers in the field at the 8.5¢ +/MCF price by 1952 contracts (referred to in his letter to us dated 4-13-62); feared the other producers would be dissatisfied if Ark-La paid us more; and suggested a negotiated price. He was advised that these were unacceptable; that royalty would continue to be computed on the Union Producing Company price (our letter of 3-27-62) and in accordance with the lease instrument and regulations; and that Ark-La had the right of appeal.

He expressed little interest in an appeal but wished to have time to consult their attorney, who will be back from vacation in about a week, and then present the matter to the Company board (?), and that we would hear further from him in 10 to 14 days. It seemed most likely that Ark-La will agree to recalculate their royalty payments in agreement with our royalty statements.

Copy to Shreveport
NOF:ec

/s/ N. ORVIS FREDERICK
N. Orvis Frederick

P-80

Filed in Evidence in Suit No. 225699, September 27, 1976

ARKANSAS LOUISIANA GAS COMPANY
Shreveport, Louisiana

November 6, 1962

Mr. Robert Roberts, Jr.
J. C. Templeton
Sligo Royalty Price

The Advisory Council approved my recommendation that ALG increase its royalty price to that requested in the U.S. Geological Survey letter of March 27, 1962. Please prepare a letter advising the U.S.G.S. which will protect us legally. Copies should be sent to all of the partners owning an interest in the lease.

JCT:me
cc: Mr. J. G. Cooke, Jr.

P-81

Filed in Evidence in Suit No. 225699, September 27, 1976

ARKANSAS LOUISIANA GAS COMPANY
Shreveport, Louisiana

November , 1962

Mr. J. R. Reeve, Regional Oil and Gas Supervisor,
United States Geological Survey,
521 Wright Building,
115 West 3rd Street,
Tulsa 3, Oklahoma.

In re: Oil and Gas Lease BLM-A-054491,
Sligo Field, Louisiana, Parcel No. 3

Dear Sir:

This refers to your letter to Natural Gas and Oil Company of October 12, 1962 and conference between the undersigned and you in your office in Tulsa on October 19th.

By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures.

Very truly yours,

/s/ J C T
J. C. Templeton
Vice President.

cc: Murphy Corporation
Union Producing Company
Texas Gas Exploration Corporation
Natural Gas and Oil Company

RR Jr.
11-14-62

P-82

Filed in Evidence in Suit No. 225699, September 27, 1976

ARKANSAS LOUISIANA GAS COMPANY
Shreveport, Louisiana

November 15, 1962.

M. J. R. Reeve, Regional Oil and Gas Supervisor,
United States Geological Survey,
521 Wright Building,
115 West 3rd Street,
Tulsa 3, Oklahoma.

In re: Oil and Gas Lease BLM-A-054491,
Sligo Field, Louisiana, Parcel No. 3

Dear Sir:

This refers to your letter to Natural Gas and Oil Company of October 12, 1962 and conference between the undersigned and you in your office in Tulsa on October 19th.

By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of \$0.117432 per mcf until January 1, 1962; \$0.130252 until January 1, 1967 and thereafter \$0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures.

Very truly yours,

/s/ J. C. TEMPLETON
J. C. Templeton
Vice President.

cc: Washington 11/21/62
cc: Murphy Corporation
Union Producing Company
Texas Gas Exploration Corporation
Natural Gas and Oil Company

P-174

Filed in Evidence in Suit No. 225699, October 12, 1976

January 11, 1974

Certified mail
Return receipt requested

Arkansas Louisiana Gas Company
P. O. Box 1734
Shreveport, Louisiana, 71151

Attention: Mr. John Miles
Gas Purchase Contract Section

Re: Gas Purchase Contract by and between
Arkansas Louisiana Gas Company (Buyer)

and

D. B. McConnell, et al (Seller)
Date: January 11, 1952
Sligo Gas Field, Bossier Parish, La.

Gentlemen:

Please refer to that certain Gas Purchase Contract executed on the 11th day of January, 1952, by Arkansas Louisiana Gas Company, Buyer, and D. B. McConnell, et al, Seller, covering certain properties situated in the Sligo Gas Field, Bossier Parish, Louisiana. This contract covers and includes the purchase of natural gas produced from those certain oil, gas and mineral leases covering lands in the Sligo Gas Field, Bossier Parish, Louisiana, which are set out and described on "Exhibit A", attached to and made a part of said contract.

I am one of the party sellers to the contract, having executed same on January 25, 1952. The term of this contract is for the period January 26, 1952 to June 1, 1980. Section 8. *Price* of said contract provides that the price to be paid by Arkansas Louisiana Gas Company, Buyer, for each one

thousand cubic feet of gas delivered to Buyer, shall be as follows:

(e) $0.10596—for the period June 1, 1970, through May 31, 1975, and it is my understanding that Arkansas is presently paying this price.

However, Paragraph (D) of Section 8, *Price* of the said contract contains an escalation clause which reads, in part, as follows:

"Section 8. *Price*.

(D) If at any time during the term of this agreement, Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract;"

We have received some information and advice to the effect that Arkansas Louisiana Gas Company is now purchasing gas in the Sligo Field, Bossier Parish, Louisiana, from other party Sellers at a price in excess of $0.10596 per MCF. Specifically, we have been advised that Arkansas is purchasing gas from that part of the Sligo Gas Field, Bossier Parish, Louisiana, located within the geographical limits of the United States Military Reservation known as Barksdale Air Force Military Reservation, and is paying a price in excess of $0.10596 per MCF.

We further understand that one of the party Sellers receiving such a price for its gas to the Arkansas Louisiana Gas Company is the United States Government, fee land owner on which some of these producing wells are located.

In accordance with the terms and provisions of my contract with Arkansas Louisiana Gas Company, dated January 11, 1952, I would, therefore, respectfully request that you please provide me with full information relating to all other Gas Purchase Contracts entered into by Arkansas Louisiana Gas Company covering purchase of natural gas in the Sligo Gas Field, Bossier Parish, Louisiana, including specifically the following, to-wit:

(1) Names and addresses of Party Sellers;

(2) Date of Contract;

(3) Current price being paid by Arkansas for natural gas per MCF;

(4) Is contract recorded and of public record? If so, please furnsh recording information in Bossier Parish, Louisiana.

I specifically request that you include in your report all gas being purchased by Arkansas from that part of the Sligo Gas Field located within the Barksdale Air Force Military Reservation, and any gas being purchased from the United States Government.

This request is made pursuant to the provisions of my existing contract with Arkansas Louisiana Gas Company, dated January 11, 1952, and for the purpose of determining if I am entitled to a higher price for my natural gas production which is being purchased by Arkansas.

Thanking you in advance for a prompt reply to this request.

Yours truly,

/s/ W. E. Hall, Jr.

WEH:da
bcc: Mr. Frank J. Hall

P-175

Filed in Evidence in Suit No. 225699, October 12, 1976

LAW OFFICES
HALL AND COLTHARP
P. O. Box 151
Deridder, Louisiana 70634

January 30, 1974

Arkansas Louisiana Gas Company
P. O. Box 1734
Shreveport, Louisiana, 71151

Attention: Mr. John Miles
Gas Purchase Contract Section

Re: Gas Purchase Contract by and between
Arkansas Louisiana Gas Company (Buyer)

and

D. B. McConnell, et al (Seller)
Date: January 11, 1952
Sligo Gas Field, Bossier Parish, La.

Dear Mr. Miles:

Please refer to my letter of January 11, 1974, wherein I requested information concerning the possible purchase of natural gas by Arkansas Louisiana Gas Company in the Sligo Gas Field of Bossier Parish, Louisiana, from other sellers in excess of the price presently being paid under the terms of the above contract, dated January 11, 1952, entered into by Arkansas Louisiana and D. B. McConnell, et al, Sellers.

Specifically, we have been advised that Arkansas Louisiana Gas Company is now, and has been in the past, purchasing natural gas in the Sligo Gas Field, Bossier Parish, Louisiana, from the United States of America and is paying approximately $0.19 cents per MCF. If this is a fact, then

we are of the opinion that Paragraph (D) of Section 8, *Price*, of the aforesaid contract would apply and that Arkansas Louisiana would be liable to the sellers under the terms of the McConnell Contract, dated January 11, 1952, for such higher price being paid to the United States of America.

We would, therefore, again respectfully request that you please furnish us with this information, as requested in our letter of January 11, 1974, concerning the price for natural gas being paid to the United States of America for natural gas produced in the Sligo Gas Field, Bossier Parish, Louisiana.

Thanking you in advance for a prompt reply to this request.

Yours truly,

/s/ W. E. HALL, JR.
W. E. Hall, Jr.

WEH:da
bcc: Mr. Frank J. Hall

P-176

Filed in Evidence in Suit No. 225699, December 3 ,1976

ARKANSAS LOUISIANA GAS COMPANY
INTERNAL CORRESPONDENCE

Shreveport, Louisiana
January 15, 1974

To: Mr. G. L. Hetherwick

From: Jim Monk

Subject: D. B. McConnell, et al—Sligo Field, Louisiana

Enclosed is a copy of a letter dated January 11, 1974, concerning prices paid from the above referenced field. Please draft a reply to this letter stating that "we have not exceeded the price stated in the contract." Therefore, the "Favored Nations" part of this contract has not been activated. I have enclosed the permanent file for your reference.

JMM:jj
Enclosures

P-177

Filed in Evidence in Suit No. 225699, December 3, 1976

ARKANSAS LOUISIANA GAS COMPANY
INTERNAL CORRESPONDENCE

Shreveport, Louisiana
January 17, 1974

To: Mr. Jim Monk

From: Gilbert L. Hetherwick

Subject: D. B. McConnell, *et al*
Sligo Field, Louisiana

Attached is a draft of a letter responding to Will Hall's letter of January 11, 1974, in accordance with your request of January 15, 1974.

I drafted this response like you requested to simply state that we are not paying a higher price than the price in his contract. However, that is not what he asked for. He asked for specific information concerning all contracts in the Sligo Field and particularly information concerning the price we are paying the United States Government (see page 2 of his letter).

I assume from your request that you meant to deliberately not give him what he had asked for. However, I would point out that Will Hall is a lawyer and our response looks like we may be putting him off. All he has to do is draft a petition and file it in order to sue us and then he can subpoena all the contracts he wants information about. This would be troublesome and probably expensive for Arkla and I would suggest that you would consider giving him more specifically the information he asks for unless there is some reason not to.

Your file is returned herewith.

Very truly yours,

/s/ G.L.H.

GLH/fm
Attachments

P-178

Filed in Evidence in Suit No. 225,699, December 3, 1976

Arkansas Louisiana Gas Company
P. O. Box 1734 • Shreveport, Louisiana • 71151

January 18, 1974

Mr. W. E. Hall, Jr.
Hall and Coltharp
P. O. Box 151
DeRidder, Louisiana 70634

Re: Gas Purchase Contract by and between
Arkansas Louisiana Gas Company (Buyer)

and

D. B. McConnell, *et al* (Seller)
Date: January 11, 1952
Sligo Gas Field, Bossier Parish, Louisiana

Dear Mr. Hall:

We have your letter of January 11, 1974, asking for certain information in regard to the Favored Nations Clause in your contract of January 11, 1952.

Please be advised that we have not paid and are not paying another party seller for gas produced from any wells in the Sligo Gas Field a higher price than is provided to be paid for gas delivered under your contract.

Very truly yours,

John C. Miles

GLH/fm

P-192

Filed in Evidence in Suit No. 225699, October 7, 1976

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71163
Telephone (318) 221-6858

August 19, 1975

Air Mail
Securities and Exchange Commission
Attention: Mr. Blair Corkran
Division of Corporation Finance
Washington, D. C. 20549

RE: Arkansas Louisiana Gas Company,
Registration No. 2-54218, Form S-9

Dear Sirs:

This is in response to telephone conversation on Monday, August 18, yesterday, between Mr. Corkran and the undersigned as attorney for Arkansas Louisiana Gas Company. Mr. Corkran inquired as to whether the pending lawsuit of Frank J. Hall and fourteen other plaintiffs against Arkansas Louisiana Gas Company (the "Company"), No. 225,699 on the docket of the First Judicial District Court of Louisiana within and for the Parish of Caddo, should be described in the preliminary prospectus dated July 21, 1975, a part of the above registration, under the caption "Legal Proceedings" on page 19.

The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company. The plaintiffs brought the suit on a contract between them (or in certain instances their predecessors) with a number of other sellers not party to the suit and the Company for the sale of gas to be produced from certain gas production properties in the Sligo Gas Field, Bossier Parish, Louisiana. The contract was executed in January,

1952, and its term extends into 1980. The suit claimed that the agreed prices under the contract, by reason of payments made by the Company to the Federal Government under an oil and gas lease, beginning in 1961 were increased and had not been properly paid by the Company. The suit asked for a declaratory judgment, an accounting, and unspecified damages in the amount of $1.5 million. The defendant answered the suit denying plaintiffs' version of the agreement and claiming that the prices to the plainitffs had been properly calculated and paid. After extensive preliminary proceedings, the plaintiffs on June 12, 1975 superseded their original demand with an amended petition on which the action is now pending. The amended petition appears to be for the same demand and on the same legal and factual basis as to the plaintiffs' claim, but instead of asking for an accounting, seeks damages for breach of the contract in an amount of $8,755,000 and cancellation of the contract. The Company believes that it has paid plaintiffs all sums due under the contract and expects to prevail on the principal issue of the suit. In addition, there are a number of other issues, the decision of which will be material if plaintiffs should prevail on their claim; for example, prescription (limitation), whether the Federal Power Commission has sole jurisdiction over plaintiffs' demand, the effect on the agreement and its interpretation and performance of the Natural Gas Act and the Federal Power Commission's regulations thereunder. It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.

The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not "material" in the sense in which the Commission uses that term in its rules with regard to the preparation of prospectuses. If the entire eight million dollar claim should be considered at issue in the suit, it would affect earnings by additional gas purchase expense with an offset to the extent of 50% by reduc-

ing income taxes, and, as we understand the proper accounting, the additional expense would be spread over the fourteen years back to 1961. If the entire amount at risk in the suit should be considered as affecting the year in which a judgment might become final, the risk, $4,377,000, would be barely more than 10% of the net income of the Company for the year ending May 31, 1975, as reported in the prospectus, and could be compared also with the income from continuing operations before income taxes (58.60 million dollars), and with the income from continuing operations (39.24 million dollars). The amount claimed is obviously less than 10% of current assets and less than 5% of total assets—tests of materiality which are mentioned in certain of the Commission's rules. The annual reduction in income would be in the order of $315,000.

We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects, we concluded that it should not be described in the prospectus.

We would be glad to have your conclusions on this point.

Very truly yours,

/s/ Robert Roberts, Jr.
Blanchard, Walker,
O'Quin & Roberts

RRJr/er
cc: Eugene R. Sullivan, Esq.
David G. Ormsby, Esq.

Suit No. 225,699

Plaintiffs	Damages*	Less Deduction for ¼¢ per Mcf Interest Thereon	Credit for** All Pertinent Factors and Interest Thereon	Sub-Total of Damages	Credit for Shrinkage Factor	Net Recoverable Damages
HALL INTERESTS						
Frank J. Hall	532,440,81	12,717.26	76,615.79	443,107.76	19,939.85	423,167.91
W. E. Hall, Jr.	290,422.32	6,936.69	41,790.86	241,694.77	10,876.26	230,818.51
Virgil J. Hall	145,211.16	3,468.35	20,895.41	120,847.40	5,438.13	115,409.27
HARRELL INTERESTS						
Carlyle W. Urban, Trustee	830,923.47	19,846.47	146,958.04	664,118.96	29,885.35	634,233.61
John K. Harrell, Sr.	103,865.44	2,480.81	18,370.51	83,014.12	3,735.64	79,278.48
James E. Harrell	103,865.44	2,480.81	18,370.51	83,014.12	3,735.64	79,278.48
SEYMOUR WEISS INTERESTS						
Elva L. Weiss	226,548.93	5,411.09	35,099.93	186,037.91	8,371.71	177,666.20
National American Bank, Executor	226,548.93	5,411.09	35,099.93	186,037.91	8,371.71	177,666.20
T. F. Philyaw	3,584.61	85.62	(388.32)	3,887.31	174.93	3,712.38
W. O. Cochran	17,180.49	410.35	1,572.63	15,197.51	683.89	14,513.62
D. B. McConnell	247,211.51	5,904.61	102,884.65	138,422.25	6,229.00	132,193.25

S. G. Myers	124,830.81	2,981.56	(14,502.49)	136,351.74	6,135.83	130,215.91
James A. Noe	539,636.42	12,889.13	25,670.46	501,076.83	22,548.46	478,528.37
Asa Benton Allen	79,261.60	1,893.15	6,915.51	70,452.94	3,170.38	67,282.56
Elaine Allen	73,332.65	1,751.54	3,272.91	68,308.20	3,073.87	65,234.33
TOTALS	3,544,864.59	84,668.53	518,626.33	2,941,569.73	132,370.65	2,809,199.08

* These computations include production runs through December 31, 1975 and damages for loss of use of money through June 30, 1976.

** Pertinent Factors

1. Louisiana Severance Tax Reimbursement
2. Compression charges, deductions and expenses
3. Condensate payments
4. Dehydration charges
5. Delivery points
6. Basis of measurement
7. Delivery pressures
8. Gasoline and L.H.C. "G.P.M." content
9. Shrinkage factors

P-335

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Number C-75-1168

FRANK J. HALL, ET. AL., *Plaintiffs*

vs.

ARKANSAS LOUISIANA GAS COMPANY, *Defendant*

James Fleet Howell, Esq.
Feist, Schober & Howell
Shreveport, Louisiana
Attorney for Plaintiffs

Robert Roberts, Jr., Esq.
Marlin Risinger, Jr., Esq.
W. Michael Adams, Esq.
Blanchard, Walker, O'Quin & Roberts
Shreveport, Louisiana
Attorneys for Defendant

RUBIN, District Judge:

This suit was filed in Louisiana State Court seeking damages for alleged breach of contract. Sixteen months later, the plaintiffs amended their state petition. The defendants promptly removed to federal court, on the basis that the amendment raised a federal question. The plaintiffs countered with a motion to remand. Since the amended complaint does not appear to pose a case arising under the Constitution or laws of the United States, the motion to remand is GRANTED. The facts and authorities that require this conclusion follow:

I.

The plaintiffs first filed suit in state court on July 18, 1974. The plaintiffs alleged that they are producers of

natural gas in the Sligo Field in northern Louisiana who entered into a gas purchase agreement on January 11, 1952, pursuant to which they were to sell natural gas to the defendant at a stated price per mcf of gas. The gas purchase agreement includes a "Favored Nations Clause," which provides for an increase of the price to be paid the plaintiffs if the defendant pays a higher price to any other producer in the Sligo Field who subsequently sells gas to the defendant.[1]

---

[1] (D) If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact "higher" than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for the purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowance for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction.

The plaintiffs alleged that, beginning in September, 1961, defendant breached the gas purchase agreement by paying to the United States a higher price for gas and liquified hydrocarbons produced from the same field than the sellers paid the plaintiffs, and by failing and refusing to inform the plaintiffs of these payments to the United States. This claim is clearly merely a claim for breach of a contract, and would be determined by state law.

Multiple defenses were raised. On May 30, 1975, the defendant filed a supplemental and amended answer, urging that the Federal Power Commission "has sole jurisdiction over the sale of gas by plaintiffs to Arkansas Louisiana Gas Company under the January 11, 1952 gas purchase contract . . ;" that "[u]nder Section 4(d) of the Natural Gas Act, 15 U.S.C. § 717d, plaintiffs are required to give notice of any proposed increase of rates;" that the plaintiffs have not done this; and the FPC is the only tribunal that may lawfully determine the issues raised by the plaintiffs. The defendant finally urged that "by order of the Federal Power Commission in *Other Southwest Area Rate Order No. 607 and 607-A*, plaintiffs may not, even if the price be contractually authorized, collect under the subject contract for gas currently being delivered any rate higher than the area rate, namely, a rate of 20.6¢ per mcf, with lesser maximum prices applicable to earlier periods." The defendant also filed an exception of no cause of action and, alternatively, a motion for summary judgment. These were argued and submitted on briefs.

In an effort to meet the legal barriers thus defensively erected, the plaintiffs filed successive supplemental pleadings. In their Second Supplemental and Amended Petition, (the Second Petition), which superseded all of their prior pleadings, the plaintiffs repeated the basic allegations made at the beginning of the suit. In addition the plaintiffs alleged:

> "The plaintiffs herein agree and concur with the statement and conclusion of Arkansas Louisiana Gas

Company's attorney and counsel, Mr. Gilbert L. Hetherwick, a member of the Law Firm of Blanchard, Walker, O'Quin & Roberts, as set forth in his Arkansas Louisiana Gas Company memorandum dated June 26, 1974, a copy of which is annexed hereto, to the fact that the plaintiffs herein, as Small Producers under Section 157.40(e) of the Federal Power Commission Rules and Regulations (18 C.F.R., Section 157.40) can automatically get the benefit of a favored nations clause if it is activated, although they cannot thereby go to a price which is above the applicable just and reasonable area rate. A copy of Section 157.40(e) of the Federal Power Commission Rules and Regulations is attached hereto and made a part hereof and the plaintiffs herein respectfully request that this Honorable Court take judicial notice thereof."

The defendant's thesis is that the Second Petition necessarily implies that the sellers were selling natural gas in interstate commerce for resale, hence the plaintiffs are a natural gas company, and that all the sales have been made subject to a schedule of rates on file with the FPC as required by the Natural Gas Act. Explicit allegations of this kind are nowhere found in plaintiffs' pleadings; the conclusion that the petition embodies these claims is derived by inference from the general allegations and from Article 22.

Turning to Article 22, the defendants contend this must be read as asserting both that the plaintiffs have a status under the Natural Gas Act as small producers, and that this status entitles them to receive a rate higher than the rates filed. Since these are matters to be determined by federal law, rather than state law, the argument runs, the Second Petition raises a federal question.

II.

Federal jurisdiction over cases filed in state court is conferred by 28 U.S.C. § 1441, which, in pertinent part, provides, "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable." (Emphasis supplied.) The original jurisdiction of federal district courts is stated in virtually identical terms: it consists of "all civil actions wheren the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and *arises under* the Constitution, laws, or treaties of the United States." 28 USCA § 1331. (Emphasis supplied.) Of necessity then, when a case is sought to be removed, the jurisdictional issue is whether the action is one that would be within the jurisdiction of the federal district court had it been filed there initially. See Moore's Federal Practice ¶ 0.60[9]. The language in both statutes traces Aritcle III of the Constitution: "The judicial power shall extend to all cases in law and equity arising under this Constitution, [and] the laws of the United States. . . ." Art. III, § 2.

Since 1824, Osborn v. Bank of the United States, 1824, 22 U.S. (9 Wheat.) 738, has furnished the standard for interpretation of the constitutional provision: "that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction," 22 U.S. at 822, regardless whether other "questions may arise in it, which depend on the general principles of the law, not on any act of Congress." Ibid.

But there are potential federal questions in almost every litigation: if nothing else is presented, questions may arise as to the constitutionality of governing state law. Currie, Federal Courts 315. Of practical necessity, jurisdiction should be determinable when a suit is filed; else the case might be litigated entirely at great expense to the parties

and the public, only for them to find that all was for naught because the court lacked jurisdiction. Latent issues, sufficient to confer jurisdiction under some circumstances, might or might not arise.

Hence jurisdiction must be determined on the face of the plaintiff's complaint; this is the well-pleaded complaint rule, formulated in Louisville & Nashville R.R. v. Mottley, 1908, 211 U.S. 149, 29 S. Ct. 42. That was an action in federal court to compel specific performance of a contract to give the plaintiffs railroad passes for their lives. The complaint alleged that the railroad had declined to renew the passes, basing its refusal on an act of Congress that forbade the giving of free passes. The bill alleged that the act did not apply, but, if it did, it was unconstitutional. The Supreme Court said:

> "It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." 29 S.Ct. at 43.

Hence the federal courts lacked jurisdiction.

Commentators note that the *Mottley* rule operates to "exclude from the federal courts a considerable category of cases in which there is an actual dispute over federal rights. . . ." Currie, op. cit. supra at 328; Moore's Federal Practice ¶ 0.60[8-4]. Nonetheless, the rule serves so useful

a purpose that the American Law Institute, in a study of the jurisdiction of the federal courts, urged its retention. ALI Study of the Division of Jurisdiction between State and Federal Courts (1969) § 1311, p. 188-191. The Reporters' reasoning parallels the original pragmatic justification for the rule.

> "A litigant who invokes the jurisdiction of the federal court ought to be able to do so with some fair assurance that the case will be determined in that court. He cannot do so if his jurisdictional allegation is, of necessity, no more than a guess as to the strategy his opponent will follow. The time of the court and the lawyers, and the money of the litigants, would be wasted needlessly on the preliminary stages in federal court of a case which is ultimately dismissed. Some protection would have to be given the plaintiff, in a case which is so dismissed, against being barred from a subsequent state action by a state statute of limitations."

The application of the *Mottley* rule to the Declaratory Judgment Act, 28 U.S.C. § 2201, was considered in Skelly Oil Co. v. Phillips, 1950, 339 U.S. 667. Phillips had contracted to buy gas from Skelly for resale to a pipe-line company. Each of the several contracts involved gave Skelly the right to terminate if the pipe-line company did not secure an FPC certificate for its line. After a certificate was issued, Skelly gave notice of termination. Phillips sued for a declaratory judgment that the contracts were still in effect. In discussing whether there was federal jurisdiction, the Supreme Court said:

> "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts. Whatever federal claim Phillips may be able to urge would in any event

be injected into the case only in anticipation of a defense to be asserted by petitioners. 'Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit.' Gully v. First National Bank, 299 U.S. 109, 115; compare 28 U.S.C. § 1257, with 28 U.S.C. § 1331. Ever since Metcalf v. Watertown, 128 U.S. 586, 589 it has been settled doctrine that where a suit is brought in the federal courts 'upon the sole ground that the determination of the suit depends upon some question of a Federal nature it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character.' But 'a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.' Tennessee v. Union & Planters' Bank, 152 U.S. 454, 464. The plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation of [sic] avoidance of defenses which it is thought the defendant may interpose.' Taylor v. Anderson, 234 U.S. 74, 75-76; Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152. 339 U.S. at 672."

The issue, then, is correctly stated by Ark-La: "whether plaintiffs' Second [Petition] has made a claim that states a federal question and this issue turns on the words of that Second [Petition] and, to the extent relevant, the circumstances of its filing."

Congress' Choice Of Laws Applicable To The Natural Gas Industry

Not all issues arising in the natural gas industry are federal questions. Although Congress doubtless had authority to regulate at least all of the interstate aspects of the natural gas industry, it has never asserted this power. Instead, in the Natural Gas Act, it limited itself to regula-

tion of those areas that were, under the Commerce Clause theory as articulated in 1938, when the Act was passed, beyond the constitutional limits of state regulatory authority.

The Act therefore asserts limited federal authority, and confirms state authority over all other aspects of the industry. The Report of the House Committee on Interstate and Foreign Commerce makes this evident. H.R. Rep. No. 709, 75th Cong. 1st Session 1 (1937) states:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U.S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction." H.R. Rep. No. 709, 75th Cong., 1st Sess. 1 (1937).

The scope of federal regulation was deliberately narrow, as the Supreme Court concluded in Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana, 1947, 332 U.S. 507, 516, 68 S. Ct. 190, 195, 92 L.Ed. 128:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."

Contractual claims for breach of a natural gas contract presented under state contract law are not drawn into

federal jurisdiction because ultimate resolution of the claims may involve interpretation of the Natural Gas Act. Pan American Petroleum Co. v. Superior Court of Delaware, 1961, 366 U.S. 656, 81 S. Ct. 1303, 6 L.Ed.2d 584. Jurisdiction is "not determined by ultimate substantive issues of federal law." 366 U.S. at 662, 81 S. Ct. at 1307. It depends on "how he [the plaintiff] casts his action." Ibid.

Accordingly, the mere fact that this suit involves a contract for the purchase of natural gas does not mean that this case "arises under" the Natural Gas Act or a body of federal common law governing such contracts. City of New Orleans v. United Gas Pipe Line Co., E.D. La. 1974, 390 F. Supp. 891.

The reference to federal law in the Second Petition is on its face the anticipation of a defense: that the Favored Nations clause of the contract is unenforceable because of federal law. To prove the invalidity of this defense the plaintiffs must prove both their status and their right to receive the rates they seek under FPC regulations. But these two issues arise only by way of countering the anticipated defense that the plaintiffs may not recover under their Louisiana contracts, the basic right they assert. The anticipation was not spectral, as the history of the action in state court demonstrates: the defense that the state contract could not be relied upon because of federal law had in fact been urged, and plaintiffs feared dismissal of their case under the exception of no cause of action on the basis of this defense. But since plaintiffs sued for breach of contract, here, as in Phillips Petroleum Company v. Texaco, Inc. 1974, 415 U.S. 125, 128, 94 S.Ct. 1002, 1004, 39 L.Ed.2d 209, "it is clear that their [the Natural Gas Act and regulations of the FPC] effect is no more than to overcome a potential defense to the action."[2] See also Taylor v. Anderson, 1914, 234 U.S. 74, 34 S.Ct. 724, 38 L.Ed. 1218.

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[2] **Phillips is distinguishable, but the preposition quoted is applicable here.**

Paragraph 22 of the Second Petition does not in haec verbae indicate that plaintiffs' claim for small producer status and rates is made in anticipation of a defense, but a fair construction of the entire complaint in the light of the history of the law suit demonstrates that Paragraph 22 is counter-defensive in nature. Stated in simplest form, the plaintiffs' arguments in the Second Petition are:

1. Plaintiffs and defendants have a contract under state law.
2. Defendant has violated the contract.
3. Plaintiffs may recover under state law.
4. This claim is not affected by federal law.
5. If it is, the plaintiffs still have a claim.

The plaintiffs' claim that they have the status of small producers is not an essential element of their cause of action. See Gully v. First National Bank, 1936, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70. That alleged status and the prices recoverable, if it applies, are arguments that their state rights under the Favored Nations Clause are not erased by the Natural Gas Act. This entire issue becomes pertinent only if the plaintiffs fail in their primary postulate, that they have a contract that is controlled by state law. The claim here is different from the one the plaintiffs made in Montana-Dakota-Utilities Company v. Northwestern Public Service Company, 1951, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912, for in *Montana-Dakota* the plaintiffs sought to obtain payment in accordance with rates filed with the FPC under the Federal Power Act; here the suit is for rates fixed by contract and the Commission-filed rates are involved only if asserted to defeat recovery.

Even if the plaintiffs were claiming that the regulations of the Commission gave them a cause of action, without reference to the contractual language, the Second Petition would not state a claim "arising under the Constitution and

Laws of the United States." The complaint must not only state a "federal question," but a substantial one; a claim "so attenuated and unsubstantial as to be absolutely devoid of merit" will not confer jurisdiction. Newburyport Water Co. v. Newburyport, 1904, 193 U.S. 561, 579, 24 S.Ct. 553, 557. See Hagans v. Lavine, 1974, 415 U.S. 528, 94 S.Ct. 1372. The regulation in question, 18 C.F.R. § 157.40,[3] evidences no intention to *grant* small producers a right to an increase in price in the absence of some contractual provision allowing such an increase. To attempt to read such an effect into the provision would be so fanciful and farfetched that it would not serve as a basis of federal question jurisdiction if it in fact had been urged by the plaintiffs.

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[3] The pertinent parts of the regulation read as follows:

(c) Exemption under blanket certificate. Small producers certificated hereunder shall be authorized to make small producer sales nationwide pursuant to existing and future contracts at the price specified in each such contract. However, no small producer shall be relieved from compliance with section 7(b) of the Natural Gas Act with respect to any small producer sale exempted hereunder. The exemption authorized herein shall not apply to any jurisdictional sale made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer.

* * *

(e) Limitation on contractual provisions. No Small Producer granted exemption under paragraph (c) of this section shall charge or collect any rate for a small producer sale of natural gas in excess of the applicable area just and reasonable base rate ceiling, or, where none is available, the appliable area guideline initial rate ceiling, where the contractual right to such rate is based upon any contractual provision which would not be permitted by paragraphs (a), (b), (b-1), and (c) of § 154.93 of this chapter. For the purposes of this limitation, it shall make no difference whether the contract was executed prior to or subsequent to April 3, 1962.

Accordingly, the case is REMANDED to the First Judicial District Court, Parish of Caddo, State of Louisiana, defendant to bear all costs.

/s/ ALVIN B. RUBIN
United States District Judge

New Orleans, Louisiana, this 29th day of January, 1976

Western District of Louisiana. This to to certify that the above and foregoing contained on this and preceding 10 pages is a true and correct copy of the original.

ROBERT H. SHENWELL, Clerk
February 13, 1976
By /s/ RUTH ELKINS
Deputy Clerk

P-336

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Number C-75-1168

FRANK J. HALL, ET AL, *Plaintiffs*

versus

ARKANSAS LOUISIANA GAS COMPANY, *Defendant*

James Fleet Howell, Esq.
Attorney for Plaintiffs

Robert Roberts, Jr., Esq.
Marlin Risinger, Jr., Esq.
W. Michael Adams, Esq.
Attorneys for Defendant

RUBIN, District Judge:*

The brief filed by Arkansas Louisiana Gas Company demonstrates at most that the defenses to the complaint raise issues that may require resolution under federal law, but the complaint is nonetheless founded upon state law. Whether state law is, or is not, ultimately determinative of the issues presented must be decided by the state court. See Eastern Petroleum Co. v. Kerr-McGee Corp., 7th Cir. 1971, 447 F.2d 569, where a case involving similar issues was removed to federal court on the ground of diversity but state law was applied. The jurisprudence relied upon in the motion for reconsideration indicates the correctness of the remand. In Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 1951 71 S.Ct. 692, it was the plaintiff who claimed that past rates were unreasonable

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* Visiting Judge.

within the meaning of the Federal Power Act; here the plaintiffs claim that they are entitled to a rate established by a contract, the validity and interpretation of which must be determined by state law. See City of New Orleans v. United Gas Pipe Line Co., E.D. La. 1974, 390 F.Supp. 861, 865. If paramount federal law alters that interpretation, this is a matter of defense.

The stay order is vacated, and the remand to state court shall take effect without further orders.

/s/ ALVIN B. RUBIN
United States District Judge

New Orleans, Louisiana
February 13, 1976

P-337

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. 75-1168

FRANK J. HALL, ET AL

versus

ARKANSAS LOUISIANA GAS COMPANY

JUDGMENT

Filed February 5, 1976

This action having been submitted on the record to the Court, Honorable Alvin B. Rubin, District Judge, presiding, on plaintiffs' motion to remand, and the issues having been duly considered and an opinion having been duly rendered on January 29, 1976, granting said motion.

IT IS ORDERED AND ADJUDGED that this case be, and same hereby is, remanded to the First Judicial District Court, Caddo Parish, at defendant's costs.

The Clerk of this Court is hereby directed to mail certified copy of this judgment to the Clerk of said State Court, as required by T. 28, U.S.C. Sec. 1447(c).

New Orleans, Louisiana, this 2nd day of February, 1976.

/s/ ALVIN B. RUBIN
United States District Judge

Attest: A true copy
Date: February 5, 1976

/s/ By: RHONDA M. LAFITIE
Deputy Clerk, ...
Western District of Louisiana

D-55

EXHIBIT "B"

Filed in Evidence in Suit No. 225,699, January 10, 1977

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATION

I hereby certify that the attached 5 pages are true and correct copies of a document on file with the Commission.

Date: November 16, 1976

/s/ KENNETH F. PLUMB
Secretary

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CONTRACTS: JURISDICTION

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III,
and James G. Watt

Docket No. RI76-28

ORDER DENYING PETITION

(Issued March 8, 1976)

Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the "favored nations" clause in the January 11, 1952 contract with Frank J. Hall, *et al.* (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla.

On or about January 11, 1952, Respondents, or their predecessors, entered into a written agreement with Arkla providing for the sale by them to Arkla of natural gas to be produced from Respondents' wells in the Sligo Gas Field, Bossier Parish, Louisiana, for a primary term expiring in 1980. The contract is on file with the Commission as Respondents' FPC Gas Rate Schedule No. 4. Under this contract if Arkla should purchase gas from any other well in the Sligo Gas Field at a higher price than that paid to the Respondents, then the price to be paid to the Respondents must be increased accordingly.

On July 18, 1974, Respondents brought suit against Arkla in the First Judicial District Court, Caddo Parish, Louisiana,[1] claiming that the higher royalty payments made to the United States by Arkla with respect to certain of its on-system pipeline production in the Sligo Gas Field have triggered the favored nations provision in the contract and that Arkla has incurred substantial liabilities to Respondents at the higher rate for gas purchased under such contract. On March 14, 1975 in the same court docket, Arkla filed a Petition in Reconvention seeking a declaratory judgment from the court, and filed a motion for a separate trial.

In its petition Arkla contends that such royalty payments to the United States did not and will not constitute a "purchase from another party seller [of] gas produced from a well or wells located in the Sligo Gas Field." Arkla further argues that the controversy involves matters within the Commission's exclusive jurisdiction over which a court has no jurisdiction because Respondents must first exhaust their administrative remedies.

Respondents on October 17, 1975, filed a preliminary answer and response seeking an order dismissing Arkla's petition to the Commission and arguing that Louisiana state courts have jurisdiction in this matter, and that the Commission has no authority to issue a declaratory order divesting the courts of such jurisdiction. Respondents also argue that Arkla is estopped from filing the petition with the Commission having affirmatively invoked the jurisdiction of the Louisiana courts by its Petition in Reconvention. On the same day, Respondents filed a motion for a continuance and stay of these proceedings, reserving a right to file a complete answer to Arkla's petition, and a motion to conduct discovery and to have any hearing conducted in Shreveport, Louisiana.

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[1] The action brought by Respondents is entitled "*Frank J. Hall, et al.* v. *Arkansas Louisiana Gas* Company," Docket No. 225,699.

On December 1, 1975, Arkla filed a response to Respondents' preliminary answer and filed answers opposing Respondents' aforementioned motions, therein reasserting the jurisdiction of the Commission. On December 15, 1975, Respondents filed supplements to their preliminary answer and motion for continuance and stay of these proceedings. Thereafter, on December 22, 1975, Arkla filed responses to Respondents' supplements to their preliminary answer and motion. On January 10, 1976, the Respondents filed an answer and response to the above pleadings filed by Arkla on December 22, 1975.

The jurisdictional issue before us arises out of an alleged breach of contract by Arkla for its failure to pay the Respondents a higher rate for natural gas pursuant to the favored nations clause in the underlying sales contract. Respondents have brought suit in the Louisiana courts to collect these higher rates maintaining that only the courts can resolve such contractual questions. Conversely, Arkla contends that the Commission has exclusive jurisdiction over all matters related to the sale of natural gas in interstate commerce.

There is no question that the sales of natural gas by Respondents to Arkla are subject to the jurisdiction of the Commission. Under the Natural Gas Act matters of rate regulation, filing and notice procedures are within the express statutory authority of the Commission.[2] Certainly, in determining the justness and reasonableness of a proposed rate, the Commission may exercise exclusive jurisdiction. However, there is a threshold question as to the contractual basis of such rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court. An examination of two prior Commission decisions is indicative of this policy.

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[2] 15 U.S.C. & 717c.

In orders issued on October 9, 1964 and December 3, 1964, 32 FPC 966, 1394, in *Pan American Petroleum Corporation, et al.,* Docket Nos. RI63-481, *et al.,* the Commission deferred action on proposed increased rates pending final determination of a complaint in state court. Since the contractual question pivoted on an interpretation of state statutes and since litigation was pending before the state court which would yield such interpretation, the Commission exercised its discretion by deferring action pending state court action.

Similarly, in *Merle M. Rowan, et al.* v. *Allied Chemical Corporation,* Docket No. RI68-136, 39 FPC 64 (Issued January 17, 1968), the Commission deferred action with regard to a proposed rate increase pending final determination of the contract questions in a United States district court. In that case, as in the instant proceeding, a higher rate was sought pursuant to the favored nations clause in the underlying gas sales contract. There, the Commission determined that it would be appropriate to defer to the court to decide these contract questions.

The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the *Pan American* case, *supra,* or the *Rowan* case, *supra.* This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction.[3] The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. Whle this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.

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[3] *Cf. Ashland Oil & Refining Co.* v. *F.P.C.,* 421 F.2d 17 (CA 6 1970).

The Commission orders:

For the reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied.

By the Commission.
(Seal)

Kenneth F. Plumb,
Secretary.

D-59

EXHIBIT "F"

Filed in Evidence in Suit No. 225,699, January 10, 1977

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

CERTIFICATION

I hereby certify that the attached 5 pages are true and correct copies of a document on file with the Commission.

Date: November 16, 1976

/s/ KENNETH F. PLUMB
Secretary

United States of America
FEDERAL POWER COMMISSION

SMALL PRODUCERS

Arkansas Louisiana Gas Company

v.

Frank J. Hall, *et al.*

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt

Docket No. RI76-28

ORDER CLARIFYING AND AMPLIFYING COMMISSION ORDER DENYING APPLICATION FOR REHEARING

(Issued November 8, 1976)

On June 30, 1976, Frank J. Hall, *et al.*, (Respondents) filed a Petition for Clarification and Amplification of the Commission's order dated June 4, 1976, whereby the Commission denied Arkansas Louisiana Gas Company's (ARKLA) petition for rehearing. On July 6, 1976, ARKLA filed a Limited Application for Rehearing, or, in the Alternative, Clarification, of the Commission's June 4 order.

ARKLA originally had sought a determination that the "favored nations" clause in its January 11, 1952, contract with Respondents was not triggered by certain royalty payments made to the United States Government by ARKLA. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue.

The Commission by order issued July 30, 1976, granted rehearing for purposes of further consideration of the here-

inbefore mentioned applications of ARKLA and respondents.

Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its *"Other Southwest Area Rate"* Opinion Nos. 607 [1] and 607-A.[2] The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From Jan. 1, 1965 Thru Sept. 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia [3]

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

> "I. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if con-

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[1] 46 FPC 900

[2] 47 FPC 99

[3] This rate is subject to adjustment for new or increased taxes on or after Otober 29, 1971.

tractually authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 'Most Favored Nation' contract and the related Arkansas Louisiana Gas Company division order contracts."

While the Commission has jurisdiction over natural gas containing *liquefiable* hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream.[4] Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether the respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue.

ARKLA in its application for rehearing has raised a question as to which respondent parties are covered by the small producer certificate issued in Docket No. CS73-323. The question is raised because those respondents who are covered by the small producer certificate are not required to make any rate increase filing for the period subsequent

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[4] ***Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (CADC 1973).**

to the filing of their small respondents who were issued small producer certificates are entitled to their coverage.

Commission records show that the following hold small producer certificates:

Certificate Holder	Docket No.	Cert. Issued Date	Cert. Effect Date
Frank J. Hall	CS73-323	3-30-73	10-19-72
W.E. Hall, Jr.		(Temporary)	
Mrs. Virgil J. Hall (Mrs. W.E. Hall, Sr.)			
James A. Noe	CS72-549	4-24-72	10-27-71
S.G. Myers, Jr. (Sidney G. Meyers, Jr.)	CS71-547	10-21-71	4-30-71

None of the other respondents in the above-entitled proceeding have applied for small producer certificates. However, all of the respondents, or their predecessors in interest, are listed in Exhibit "A" to the application in Docket No. CS73-323 as parties whose interests are intended to be covered thereby with respect to the sale formerly made under D.B. McConnell (Operator) *et al.,* FPC Gas Rate Schedule No. 4 and the related certificate issued in Docket No. G-3891. Accordingly, all of the Respondents involved here are covered by the small producer certificates with respect to sales formerly made under D.B. McConnell FPC Gas Rate Schedule No. 4. It is true that the parties listed in the exhibit to the application in Docket No. CS73-323 could not make any new sales. Only the certificate holders (i.e. Frank J. Hall, W.E. Hall Jr., and Mrs. Virgil J. Hall (Mrs. W.E. Hall, Sr.)) could make new sales under their small producer certificate But, this does not preclude the parties listed in the exhibit to the application from being covered by the small producer certificate with respect to existing sales specified in the application. Indeed, it would make little sense to require such parties, or their successors,

to file separate applications or to specifically join as applicants in the filed application in order to be covered by the application with respect to an existing sale. In our view the listing of the parties in the application was sufficient and there was no need for the successors of some of those interests to make any filings. This is consistent with Section 157.49(a)(3)(ii) of our regulations.

In addition to the aforementioned pleadings filed on behalf of respondents and ARKLA, the respondents filed an answer and response to ARKLA's "Limited Application of ARKLA for Rehearing, or, in the Alternative, Clarification." On July 12, 1976, ARKLA filed a Motion for Procedural Clarification of Section 1.9 of the Commission's Rules of Practice and Procedure. On July 23, 1976, ARKLA filed an answer to respondents petition for clarification and amplification. On July 28, 1976, ARKLA filed a response to respondents answer of July 19. On August 19 and 30, 1976, ARKLA filed protests stating its dissatisfaction with the procedural course followed by respondents in the filings of their pleadings of August 5 and 23. On August 26, 1976, respondents filed a protest pursuant to Section 1.10 of the Commission's Rules of Practice and Procedure.

We need not discuss the issues raised in the supplemental pleadings filed in the above-entitled docket number since the issues raised therein have no relevance to the matters previously discussed in this order.

The Commission orders:

The Commission's *Order Denying Application For Rehearing* issued June 4, 1976, in the above-entitled docket number, is hereby clarified and amplified as set forth in the body of this order.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

SMALL PRODUCERS

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

Before Commissioners: Richard L. Dunham, Chairman; John H. Holloman III, and James G. Watt.

ORDER DENYING APPLICATION FOR REHEARING

(Issued January 7, 1977)

On December 8, 1976, Arkansas Louisiana Gas Company (Arkla) filed an application for rehearing of the Commission's order issued November 8, 1976, in the above-entitled proceedings. That order clarified and amplified the Commission order issued June 4, 1976, whereby the Commission denied Arkla's petition for rehearing.

Arkla originally had sought a determination that the "favored nations" clause in its January 11, 1952, contract with Frank J. Hall, *et al.* (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue.

In its current petition, Arkla contends that the Commission erred in its November 8, 1976, order in holding that jurisdictional sales of natural gas by Respondents constitute small producer sales within the meaning of Section 157.40 of the Commission's Regulations under the Natural

Gas Act.[1] It is Arkla's position that only producers that have been granted small producer certificates qualify for small producer status for the purposes of Section 157.40 (a)(3).

In determining which producers are to be considered small producers we need only look at the definition of a small producer as set forth in Section 157.40(a)(1):

> A 'small producer' is an independent producer of natural gas as defined in § 154.91 of this chapter, who is not affiliated with a natural gas pipeline company and whose total jurisdictional sales on a nationwide basis, together with such sales of "affiliated producers" are not in excess of 10,000,000 Mcf at 14.65 p.s.i.a. during any calendar year.

Regardless of whether or not they file for their own small producer certificates, all Respondents who fall within the above-quoted definition are classified as small producers and are entitled to be covered by the certificate issued in Docket No. CS73-323 as fully set forth in the Commission order issued November 8, 1976.

If all small producers had to apply for their own small producer certificates, as Arkla suggests, then Section 157.40a(3)(ii)[2] would be meaningless except for large producer interests. Arkla's interpretation, moreover, is inconsistent with the Commission's statement in Order No. 308, 34 FPC at 1203, that "Where several small producers have interests in a single contract, we shall permit them to be covered by a single small producer certificate." In the instant case, since none of the Respondents herein were

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[1] 18 C.F.R. § 157.40.

[2] Under that section "small producer sales" include "sales of all interests under a small producer's contract if producers not qualifying as small producers have interests which in the aggregate are no greater than 12½ percent."

large producers, the blanket certificate issued to Hall also covered these other interest owners listed in the application with respect to sales formerly made under D. B. McConnell FPC Gas Rate Schedule No. 4. With one exception, the interest owners under Hall's certificate held interests of less than 12½ percent and as a result were covered under the 12½ percent limitation in Section 157.40a(3)(ii).[3] The one who exceeded the 12½ percent limitation was a small producer and thus his interest was also covered under that same section.

The Commission finds:

Arkla's application for rehearing presents no facts of legal principles that would warrant any change in or modification of the Commission's order issued November 8, 1976.

The Commission orders:

The application for rehearing filed by Arkla on December 8, 1976, is hereby denied.

(SEAL)

Kenneth F. Plumb,
Secretary.

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[3] The use of the term "aggregate" in that section refers to the situation where the interest of a large producer varies from lease to lease under a particular contract, thus requiring the use of an average in determining whether a large producer's interest exceeds the 12½ percent limitation.

TWENTY-SIXTH JUDICIAL DISTRICT COURT
OF LOUISIANA
IN AND FOR THE PARISH OF BOSSIER

No. 41,599

FRANK J. HALL, ET AL.

vs.

ARKANSAS LOUISIANA GAS COMPANY

DECLINATORY EXCEPTION OF IMPROPER VENUE

Filed September 6, 1974

NOW INTO COURT, through undersigned counsel, comes the defendant, ARKANSAS LOUISIANA GAS COMPANY, appearing solely for the purpose of this exception, and excepts to plaintiffs' petition on the following grounds:

The venue in which this suit is filed is improper because exceptor is a Delaware corporation which is licensed to do business in this state and has its principal place of business in Louisiana, in Caddo Parish. As disclosed by plaintiffs' petition, this suit is based upon an alleged breach of contract by defendant and therefore does not fall within any of the exceptions provided in the Code of Civil Procedure to the general rule that a foreign corporation licensed to do business in this state shall be sued in the Parish where its principal business establishment in this state is located.

WHEREFORE, defendant prays that this exception be maintained and that there be judgment herein in favor of defendant and against plaintiffs, and that plaintiffs' demand be dismissed at their cost.

BLANCHARD, WALKER, O'QUIN & ROBERTS

By /s/ NEILSON S. JACOBS
Neilson S. Jacobs

By /s/ CLYDE W. THURMON
Clyde W. Thurmon

Fifth Floor, First National Bank Building,
Post Office Drawer 1126,
Shreveport, Louisiana 71163.
Attorneys for Defendant.

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA
IN AND FOR THE PARISH OF CADDO

Number 225,699

Frank J. Hall, et al.

vs.

Arkansas Louisiana Gas Company

RECONVENTIONAL DEMAND OF ARKANSAS LOUISIANA GAS COMPANY, DEFENDANT IN THE PRINCIPAL ACTION

The petition in reconvention of Arkansas Louisiana Gas Company, defendant in the principal actions in this suit, herein sometimes referred to as "Arkla," with respect represents that:

1.

This action is brought by Arkla against the plaintiffs in the principal suit, namely:

Frank J. Hall, a resident of Caddo Parish, Louisiana;

W. E. Hall, Jr., a resident of Beauregard Parish, Louisiana;

Mrs. W. E. Hall, Sr., a resident of Caddo Parish, Louisiana;

The H. M. Harrell Testamentary Trust, represented by Mr. Carlyle W. Urban, Testamentary Trustee;

James E. Harrell, a resident of Houston, Texas;

John K. Harrell, Sr., a resident of Utopia, Texas;

Asa Benton Allen, a resident of Dover, Massachusetts;

Sidney G. Myers, Jr., a resident of Caddo Parish, Louisiana;

W. O. Cochran, a resident of Bossier Parish, Louisiana;

Thomas F. Philyaw, a resident of Caddo Parish, Louisiana;

Mrs. Elaine Allen, a resident of Winnfield, Louisiana;
James A. Noe, a resident of Monroe, Ouachita Parish, Louisiana;

D. B. McConnell, a resident of Shreveport, Caddo Parish, Louisiana;

Mrs. Elva L. Weiss, a resident of New Orleans, Orleans Parish, Louisiana; and

Sol Kaplan and the National American Bank, New Orleans, Co-Testamentary Executors of the Succession of Seymour Weiss, Docket No. 498-163, Parish of Orleans, State of Louisiana;

referred to herein as defendants in reconvention.

2.

Arkla's object in the suit is to obtain a judgment and decree declaring its rights against defendants in reconvention, for the past and for the future, with respect to the contract, hereinafter described and referred to, between Arkla and defendants in reconvention, with particular reference to the effect of Arkla's payments of royalties to its lessors under oil and gas leases covering lands in the Sligo Gas Field, Bossier Parish, Louisiana; and to resolve the dispute, hereinafter described, which has arisen between Arkla and defendants in reconvention with respect to the application of that contract to the facts hereinafter alleged.

3.

On or about January 11, 1952, Arkla and defendants in reconvention, or their predecessors, together with other persons, entered into a written agreement providing for the

purchase by Arkla from the other parties to the contract of natural gas produced in the Sligo Gas Field, Bossier Parish, Louisiana; a copy of that contract (herein referred to as the "Agreement") is attached to plaintiffs' original petition in this suit, was admitted by Arkla's answer, and is now incorporated by reference in this petition in reconvention.

4.

In early 1961 Arkla acquired by assignment from Union Producing Company, the original lessee, an undivided 15% interest in and to a certain oil, gas and mineral lease from the United States of America to Union Producing Company covering lands described as Sections 1, 2, 3 and 4, Township 17 North, Range 12 West, Louisiana Meridian (called "Parcel No. 3"), the lease being identified on the records of the Department of the Interior of the United States, which has administration thereof, as Lease Serial BLM-A-054491 (Louisiana). A copy of this lease, which is hereinafter sometimes referred to as the "Government lease," and which affects lands in the Sligo Gas Field, Bossier Parish, Louisiana, is attached to and made part of this petition in reconvention as Exhibit A.

5.

Arkla and its co-owners of the Government lease have developed the lands subject thereto for production of minerals and since a time in 1961 have produced from wells on the land substantial quantities of natural gas containing condensate and other hydrocarbon liquids.

6.

Arkla owns and operates a gas gathering system and a natural gasoline extraction plant in the Sligo Field and area, and owns and operates trunk pipelines connected with the outlet of its gasoline plant and used for transporting

processed gas ("residue gas") therefrom to its general pipeline system from which gas is distributed and sold in various places in North Louisiana, East Texas, Arkansas and Oklahoma.

7.

Arkla takes in kind at or near separators at the wells all of its 15% share of the gas produced from the wells on lands covered by the Government lease; previous to Arkla's receipt of the gas, it has been processed through separators which remove the readily condensable liquids and this condensate is sold by the lease operator (MRT Exploration Company) for the account of the owners of the lease, including Arkla. Arkla takes no gas produced on lands covered by the Government lease other than its 15% share of the production; the balance is taken by or for the account of its co-owners of the lease.

8.

Arkla's 15% share of the gas produced from the wells on the Government lease, after receipt by it as described in the preceding paragraph, is taken through Arkla's gathering system to its gasoline plant where the condensable hydrocarbon liquids are extracted; this process reduces to some extent the volume of the gas and requires a certain amount of the incoming stream for fuel to operate the extraction plant. At the outlet of the gasoline plant the residue gas is placed in Arkla's pipeline and transported and sold, as described in Paragraph 6 above.

9.

There has been, since the beginning of production on the Government lease no substantial change in the physical operation as described in the three preceding paragraphs of this petition. Under the provisions of the Government lease, the lessor, the United States of America, is entitled

to a royalty of 16⅔% of the amount or value of production obtained and saved from the leased lands; and under a further provision of the lease, Arkla is obligated "at the option of the lessor to pay the respective royalties herein provided for in value or in amount of production." The lessor, the United States of America, has never exercised its option to require payment of royalties from Arkla under the Government lease in amount of production, and Arkla, beginning with the first royalty payment and continuing without interruption to the present time, has paid to the United States under the lease its share of the royalties due thereunder based on the value of the gas and the gasoline and other products extracted from the gas.

10.

Under the provisions of the Government lease and the Code of Federal Regulations, Title 30, the United States of America, through the Department of the Interior, Geological Survey, expressly reserved the right to "establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas; due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard."

11.

Under the right so reserved by the lessor, as described in the preceding paragraph, the Department of the Interior, by notice in the form of letters to Arkla dated March 27, 1962, December 4, 1973 and May 17, 1974, of which copies are attached to and made part of this petition in reconvention as Exhibits B, C and D, respectively, fixed the

following amounts as the value of Arkla's share of the production from the Government lease.

Per MCF of residue gas production, at a pressure base of 15.025 psia	$0.117432	Until January 1, 1962
Per MCF of residue gas production, at a pressure base of 15.025 psia	$0.130252	Until January 1, 1967
Per MCF of residue gas production, at a pressure base of 15.025 psia	$0.140503	After January 1, 1967
Per MCF of residue gas production, at a pressure base of 15.025 psia	$0.26	Effective May 1, 1974.

By the letter of December 4, 1973 (Exhibit C), fuel and shrinkage deductions at the Sligo Plant were limited to 4½% of the wet gas volumes received.

12.

Arkla has paid royalties to the United States, under the Government lease, calculated as being 16⅔% of the value of its 15% of the production from the Government lease, determined, as required by the lessor, at the unit values set forth in the preceding paragraph, including value of extracted products at the price at which sold by Arkla. Arkla's royalty payments to the United States under the Government lease in a number of months have exceeded, on the basis of such determined values per unit of gas produced, the price paid by Arkla to defendants in reconvention under the Agreement.

13.

Defendant has made no purchase from any person of gas produced from a well or wells located in the Sligo Gas Field

of Bossier Parish since the date of the Agreement at a price higher than is provided by the Agreement to be paid for gas delivered by defendants in reconvention under the Agreement.

14.

Notwithstanding that Arkla's payment of royalties to the United States under the Government lease or to any other parties as royalty on gas produced in the Sligo Gas Field are not, as a matter of law or fact, purchases of gas, defendants in reconvention have brought this suit claiming that because of such royalty settlement or settlements Arkla has incurred substantial liabilities to them as additional price for the gas purchased from them under the Agreement. Arkla is entitled to have put at rest, for past transactions and for the future, the disagreement which exists between defendants in reconvention and Arkla, and which has been asserted in the principal action.

15.

The filing of this reconventional demand will not retard the progress of the principal action, inasmuch as defendants in reconvention are still proceeding, as plaintiffs, in discovery; and Arkla, pending completion of their discovery proceedings, has not yet begun the discovery necessary to its preparations for trial.

Wherefore, Arkansas Louisiana Gas Company, plaintiff in reconvention, prays that defendants in reconvention be served with copies of this reconventional demand and that, after trial, there be judgment on this reconventional demand in its favor and against defendants in reconvention, named in paragraph numbered 1 of this petition in reconvention, adjudging and decreeing as follows:

(1) that payments by Arkla to the United States of America, since 1961 to the present, of royalties due by Arkla to the United States under Lease Serial BLM-A-

054491 (Louisiana) calculated on the value of oil and gas produced by Arkla from the land covered by said lease, as determined by the United States Department of the Interior, Geological Survey, in fact and in law have been payments of royalty under the lease and have not been payment of the price for the purchase of gas;

(2) that payments of royalties to the United States of America in the manner described in the preceding paragraph (1) will not in the future amount, in fact or in law, to payment of the purchase price for gas and oil; and

(3) that payments by Arkla to third persons of royalties under oil, gas and mineral leases held by Arkla on lands in the Sligo Gas Field, Bossier Parish, Louisiana, where such leases provide for royalty payments based on value of gas produced and have been calculated and paid on that basis by Arkla, have not been in the past, and will not be in the future, payments of the purchase price of gas produced in the Sligo Gas Field, Bossier Parish, Louisiana.

(4) Arkla further prays for all orders and decrees necessary, for costs, and for general and equitable relief.

Shreveport, Louisiana, March 14, 1975.

Neilson S. Jacobs
Marlin Risinger, Jr.
Robert Roberts, Jr.

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71163

By /s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

Attorneys for Defendant and Plaintiff in Reconvention

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA IN AND FOR THE PARISH OF CADDO

Number 225,699

FRANK J. HALL, ET AL.

vs.

ARKANSAS LOUISIANA GAS COMPANY

ORDER

Endorsed Filed March 14, 1975

It appearing that the filing of the foregoing reconventional demand will not retard the progress of the principal action, leave is hereby granted for its filing.

Shreveport, Louisiana, March 14, 1975.

/s/ FRED C. SEXTON, JR.
JUDGE, First Judicial District Court
in and for Caddo Parish, Louisiana.

FIRST JUDICIAL DISTRICT COURT OF LOUISIANA IN AND FOR THE PARISH OF CADDO

Number 225,699

Frank J. Hall, et al.

vs.

Arkansas Louisiana Gas Company

DEFENDANT'S MOTION FOR SEPARATE TRIAL OF CERTAIN OF THE ACTIONS CUMULATED IN THIS SUIT

Now Into Court, in the above entitled and numbered cause, by its counsel, comes Arkansas Louisiana Gas Company, made defendant herein, and respectfully shows:

1.

This motion is filed to request the Court to order separate trials of plaintiffs' action herein for a declaratory judgment and defendant's reconventional demand, on the one hand, and plaintiffs' actions for damages for breach of contract and an accoutning, on the other. The grounds of this motion are as follows:

2.

Plaintiffs have cumulated in this suit, as appears from the prayer of their petition, an action for a declaratory judgment (Subdivision II of prayer of petition), an action for damages for breach of contract (Subdivision III of prayer of petition), and an action for an accounting (Subdivision IV of prayer of petition); and defendant has filed herein a reconventional demand seeking a declaration of rights as between plaintiffs and defendant under the contract between them alleged in plaintiffs' petition.

3.

Defendant does not assert that the cumulation of actions existing in this judicial proceeding is improper; but it shows that the evidence necessary for the Court's decision upon the application of the gas sales contract alleged by plaintiffs and admitted by defendants, to the facts with regard to defendant's royalty settlements under the United States Government lease also alleged in plaintiffs' petition, is relatively simple and involves principally legal rather than factual questions. Whereas, plaintiffs' claim for damages and demand for an accounting would involve evidence on, and determinations by the Court as to, the details of each monthly settlement between plaintiffs and defendant since early 1961, and recalculation of the prices in such settlements in accordance with plaintiffs' version of their rights, namely, it would require repricing each monthly settlement of each plaintiff in accordance with royalty settlements under the Government lease.

4.

Only if plaintiffs prevail in their interpretation of their rights under the contract would the monumental accounting described above be necessary. It is obvious that a determination of whether or not defendant is liable for additional prices under the contract, and the measure of that liability, prior to the trial of the accounting here sought, would simplify the proceedings in this cause, would permit a more orderly disposition of the case, and would be otherwise in the interest of justice; and that therefore a separate trial of plaintiffs' request for declaratory relief and defendant's reconventional demand should be ordered by the Court as permitted by Code of Civil Procedure, Articles 465 and 1038.

WHEREFORE, defendant prays that the Court enter an order herein for the separate trial of plaintiffs' demand for a declaratory judgment and defendant's reconventional

demand, on the one hand, and of plaintiffs' demand and an accounting, on the other.

For all orders and decrees necessary and for general and equitable relief.

Dated: Shreveport, Louisiana, March 14, 1975.

Neilson S. Jacobs
Marlin Risinger, Jr.
Robert Roberts, Jr.

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1126
Shreveport, Louisiana 71163

By /s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

Attorneys for Defendant

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing motion has this day been served by United States Mail, postage prepaid, upon M. James Fleet Howell, counsel of record for plaintiffs, at his address of record in this proceeding.

Shreveport, Louisiana, March 14, 1975.

/s/ ROBERT ROBERTS, JR.
Robert Roberts, Jr.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY,
Petitioner,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR.; THE H.M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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July, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

INDEX TO CITATIONS

CASES

Page

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY,
Petitioner,

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FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H.M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THE QUESTIONS PRESENTED BY ARKLA'S PETITIONS FOR WRITS OF CERTIORARI.

In seeking to have this Court review the consistent jurisdictional decisions of the Louisiana state district court[1], the Louisiana state court of appeal[2], the Louisiana Supreme Court[3], the United States district court for the western district of Louisiana[4], the Federal Power Commission ("F.P.C.")[5] and the Federal Energy Regulatory Commission ("F.E.R.C.")[6] *and* the substantive legal and contractual decisions of the Louisiana courts below on the merits of the instant breach of contract and damage case, Arkansas Louisiana Gas Company ("Arkla") is obviously seeking to protect and maintain its *own* private unjust enrichment and additional corporate profits[7] wrongfully derived and obtained at Respondents' loss, damage, detriment and expense by virtue of Arkla's *own* continued breach of contract and effective concealment of

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[1] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Suit No. 225,699, First Judicial District Court, Caddo Parish, Louisiana.

[2] *Frank J. Hall, et al* v. *Arkansas Lousiana Gas Company*, 359 So.2d 255 (La.App. 1978).

[3] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979).

[4] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Docket No. CA 75-1168, United States District Court, Western District of Louisiana (1976).

[5] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI76-28, Federal Power Commission.

[6] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI76-28, Federal Energy Regulatory Commission.

[7] During the fourteen years that Arkla continuously breached and violated Respondent's private contractual rights and effectively withheld and concealed all of the true, relevant and ma-

all of the true facts from Respondents from 1961 through 1975. Arkla, under the guise of protecting the "relevant public interest" against *excessive prices* for residue natural gas as sold in interstate commerce, an issue that is clearly not involved or adversely affected in this case, is obviously seeking to escape and evade its *own* independent legal and contractual obligation to respond in compensatory damages out of its *own* corporate profits for the actual losses and damages sustained by Respondents due to Arkla's continued breach of contract and wrongful misconduct for fourteen years.

Arkla by means of its two petitions for writs of certiorari as filed with this Court rather diffusely and in an interwoven fashion has commingled and asserted three complaints with respect to the decisions of the six tribunals that have ruled on the jurisdictional and/or contractual issues as presented in this case.

Arkla, in its first petition for a writ of certiorari as filed with this Court on December 18, 1978, Docket No. 78-986 and in its "supplemental briefs", has in order to protect its *own* private unjust enrichment

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terial facts concerning its continued breach of contract from Respondents, Arkla amassed over $500,000,000.00 in net profits for its stockholders. Arkla, in its annual report for 1978, has disclosed that for the year it had a net income, before income taxes, of $98,095,787.00 and that it had net income after taxes of $53,384,787.00. Arkla has consistently disclosed and estimated its maximum liability for compensatory damages in the instant Louisiana breach of contract case at "not more than $3,500,000.00". Moreover, Arkla has consistently represented and maintained "that a complete loss of the suit would not materially affect the company or its prospects".

and corporate profits, as wrongfully obtained at Respondents' loss, damage, detriment and expense from 1961 through 1975, asserted that:

(1) The United States district court for the western district of Louisiana, the Federal Power Commission and the Federal Energy Regulatory Commission have consistently erred in remanding and deferring the breach of contract and damage dispute between Respondents and Arkla to the jurisdiction of the Louisiana state courts for resolution and adjudication *and*, conversely, the Louisiana courts have erred in failing to defer the breach of contract and damage dispute between Respondents and Arkla to the primary and exclusive jurisdiction of the Federal Power Commission and Federal Energy Regulatory Commission; and

(2) Even if the Louisiana courts had the jurisdiction to interpret the "favored nations" clause as contained in the 1952 gas sales contract in order to determine and establish the true *intent* of the parties when they perfected said contract on January 11, 1952, the Louisiana courts erred in their application of ordinary rules of contract law to the evidence adduced at the trial of this case on its merits in determining the true intent of the parties.

Arkla, in its second petition for a writ of certiorari as filed with this Court on May 29, 1979, Docket No. 78-1789, has again diffusely reargued its first two specifications of error and has added a third complaint with respect to the "quantum of damages issue" as resolved and adjudicated by the Louisiana Supreme Court by asserting that:

(3) Even if the Louisiana courts had jurisdiction over the instant breach of contract and damage case and even if the Louisiana courts

properly interpreted the "favored nations" clause and correctly determined the true *intent* of the parties in light of the actual evidence, the award of compensatory damages as made by the Louisiana courts was excessive with respect to the actual losses attributable to Respondents' residue natural gas from September, 1961 through September, 1972 due to the fact that Arkla wrongfully and effectively obstructed, prevented and precluded Respondents from timely and prospectively filing notices of their contractually authorized price increases for their residue gas, which were *below* the F.P.C.'s maximum and lawful area rate ceilings, with the Federal Power Commission under section 4(d) of the Natural Gas Act from September, 1961 through September, 1972.

II.

STATEMENT OF THE CASE

On January 11, 1952 the Respondents herein, as royalty interest owners, working interest owners and overriding royalty interest owners, entered into a private gas sales contract with the wrongdoer in this case, Arkla. Under the 1952 contract and the related division order contracts Arkla agreed to purchase at severable prices Respondents' residue natural gas *and* their extracted liquid hydrocarbons, gasoline, condensate and plant products. These contracts covered all of Respondents' residue royalty gas, residue working interest gas *and* their extracted liquid hydrocarbons, condensate, gasoline and plant products as produced from various wells in the Sligo gas field, Bossier Parish, Louisiana.

The 1952 contract contained a broad "favored nations" clause under which Arkla, as Respondents' obligor, contractually agreed and solemnly bound itself

to at all times thereafter pay Respondents the highest prices that Arkla subsequently paid to anyone else for any gas produced from any well or wells in the Sligo gas field, Bossier Parish, Louisiana under any agreement, written or verbal. Specifically, Respondents, as royalty owners and working interest owners, from September, 1961 through April, 1974 repeatedly inquired of Arkla as to whether Arkla had in fact paid anyone else in the Sligo gas field higher prices than those as paid by Arkla for Respondents' residue natural gas *and* Respondents' extracted liquid hydrocarbons, gasoline and plant products. During this fourteen year period Arkla repeatedly, but erroneously and falsely, advised and informed Respondents that they were receiving for their royalty and working interest residue gas, as well as their extracted liquid hydrocarbons, gasoline and plant products, the highest prices that Arkla was paying to anyone else in the Sligo gas field.

Respondents in good faith believed and to their legal detriment relied upon Arkla's false representations from 1961 until January, 1974 when one of the Respondents inadvertently overheard a casual conversation and "rumor" to the effect that Arkla under a contractual agreement with the United States Government had been and was paying substantially higher prices for the United States government's share of the residue royalty gas *and* extracted liquid hydrocarbons, gasoline and plant products from the same Sligo field and delivered into Arkla's same Sligo pipeline system. From January, 1974 through April, 1974, Respondents repeatedly attempted without success to obtain the true facts from Arkla and the United States Government. Arkla for obvious and self-serving reasons and the United States Department of the

Interior, for inexplicable reasons, both refused to voluntarily disclose the true facts concerning the actual prices that the United States Government had received and was receiving from Arkla for its share of the residue royalty gas *and* extracted liquid hydrocarbons, gasoline and plant products as produced fromthe same Sligo gas field and delivered into Arkla's same Sligo pipeline system.

After Respondents were forced to retain their undersigned counsel, Respondents pursuant to the "*Freedom of Information Act*" for the first time on June 26, 1974 discovered that they had in fact been repeatedly misinformed and continuously misled by Arkla since September, 1961 with respect to the highest prices that Arkla had in fact been paying for residue natural gas *and* extracted liquid hydrocarbons, gasoline and plant products as produced from the same Sligo gas field and delivered into Arkla's same Sligo pipeline system. Specifically, Respondents' undersigned counsel pursuant to the "*Freedom of Information Act*" on June 26, 1974 received a letter dated June 25, 1974 from the United States Department of the Interior that in pertinent part truthfully advised that:

> "The Geological Survey made a determination, by letter dated March 27, 1962, that the following prices would be required for the Government's royalty gas: $0.117432 per MCF until January 1, 1962; $0.130252 until January 1, 1967; and $0.140508 thereafter, all at 15.025 p.s.i.a. Arkansas Louisiana Gas Company, in view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the prices represented market value in the Sligo field, acceded to the price determination made by this office.

> Effective May 1, 1974, this office made a new determination that the price for the Government's royalty gas taken by Arkansas Louisiana Gas Company would be $0.26 per MCF . . .
>
> The United States Government has not, during the existence of the captioned Oil, Gas and Mineral Lease, elected to take a portion of the gas produced in kind, rather than sell its portion to various parties."

After Respondents received the June 25, 1974 letter from the United States government on June 26, 1974, Respondents made an amicable demand upon Arkla for a full disclosure of *all* of the true, relevant and material facts concerning its contractual agreements with the United States Government and its actual payments of higher prices for the United States Government's share of the residue natural gas and extracted liquid hydrocarbons, gasoline and plant products as produced from wells in the same Sligo gas field and delivered into Arkla's same Sligo pipeline system since September, 1961. Arkla, as Respondents' contractual obligor, completely refused to disclose the true facts and arrogantly forced Respondents to file a lawsuit in order to judicially discover and judicially extract all of the true, relevant and material facts from Arkla's *own* files and records.

On July 18, 1974 the fifteen individual Respondents herein filed an action for damages for breach of contract against Arkla in a Louisiana State district court in order to: (i) judicially discover and obtain all of the true, relevant and material facts concerning Arkla's continued breach of contract since September, 1961; (ii) judicially prove and confirm the validity of the true facts and, hence, their contractual rights; and (iii)

judicially recover adequate and proper compensation from Arkla for the actual losses and damages caused and incurred by virtue of Arkla's continued breach of contract and Arkla's effective withholding and concealment of all of the true, relevant and material facts concerning its continued breach of contract from Respondents since September, 1961 with respect to their severable and contractually authorized prices for both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas. This litigation was finally and definitively concluded in the Louisiana courts on May 17, 1979.

After five years of extended, burdensome and protracted litigation, the Louisiana courts definitively established and confirmed that Arkla wrongfully injured and damaged the fifteen individual Respondents herein from 1961 through 1975 by continuously breaching and violating Respondents' private legal and contractual rights under the 1952 private gas sales contract in the same wrongful manner that other fair and impartial courts have also consistently found that Cities Service Gas Company, Gulf Oil Corporation, Kerr-McGee Corporation and Louisiana-Nevada Transit Company, as self-serving obligors, wrongfully injured and damaged other innocent, injured and aggrieved contractual obligees by wrongfully breaching and violating similar private gas sales contracts. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); and *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F. Supp. 177 (W.D. Ark. 1975).

In light of the overwhelming evidence in this case and, specifically, the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59), the Louisiana courts have now awarded the fifteen injured and damaged Respondents herein compensatory damages for the actual losses and damages which they have without question sustained and incurred with respect to both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas from 1961 through 1975 due to Arkla's continued breach of contract and Arkla's effective concealment of all of the true, relevant and material facts from Respondents from 1961 through 1975. The Louisiana courts' award of compensatory damages under the facts of this case does nothing more than to compensate Respondents for their actual losses and to place Respondents in the same or as good a position that they *would* and *could* have lawfully been in *had* Arkla timely and cooperatively honored the contract and prospectively done everything necessary to fully implement and fulfill Respondents' private legal and contractual "favored nations" rights in a manner fully consistent with the true *intent* of the contract and all applicable laws, rules and regulations from 1961 through 1975.

Under the facts and circumstances of this case *and* well established rules and fundamental principles of law, equity and justice, the Louisiana courts' award of compensatory damages in this case is right, just and proper and is fully consistent with the *justice* as consistently afforded by other fair and impartial courts to other similarly injured, damaged and aggrieved parties for actual losses and damages sustained and incurred due to the breach and violation of similar private gas sales contracts.

As Respondents will hereinafter demonstrate, it has now been conclusively confirmed by the Louisiana courts below, the F.P.C. and the F.E.R.C. that Respondents' recovery of compensatory damages for all of their actual losses and damages with respect to both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas from 1961 through 1975 will *not* adversely affect the "relevant public interest" against *excessive prices* for residue natural gas as sold in interstate commerce from 1961 through 1975.

III.

ARKLA'S COMPLAINT WITH RESPECT TO THE JURISDICTIONAL DETERMINATIONS IN THIS CASE.

In a variety of cases this Court has consistently emphasized and confirmed the fundamental principle that in our complex society courts and agencies "are to be collaborative instrumentalities of justice" and that "justice" under our American legal system will not suffer a legal wrong or injury to be without a meaningful remedy. See: *United States* v. *Morgan,* 313 U.S. 409 (1941); *Palmer* v. *Massachusetts,* 308 U.S. 79 (1939); *Texas and Pacific R. Co.* v. *Rigsby,* 241 U.S. 33 (1916); *Smith* v. *Hoboken R. W. & S. S. C. Co.,* 328 U.S. 123 (1946); *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134 (1946); *United States Alkali Asso.* v. *United States,* 325 U.S. 196 (1945); and *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301 (1935).

Specifically, in connection with the "integrity" of private contractual rights and traditional common-law contract claims for the recovery of compensatory

damages arising out of the breach and violation of private gas sales contracts, this Court has consistently held and confirmed that:

(A) *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950):

"If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

(B) *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956):

"The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules.

The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other . . .

By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry . . ."

(C) *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961):

"Suit was brought in a state court on a common-law contract claim . . .

The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common

> knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas . . .
>
> We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated. Affirmed."

Accordingly, numerous other courts of this Nation and the F.P.C. have also consistently recognized and held that "*traditional common-law contract rights*" arising out of the breach and violation of private gas sales contracts "*do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas*" under the Natural Gas Act as enacted by Congress in 1938 and that the courts may properly resolve and adjudicate such "*traditional common-law contract claims*". See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 566 (8th Cir. 1962); *State of Louisiana* v. *F.P.C.* 503 F.2d 844 (5th Cir. 1974); *Skelly Oil Co.* v. *F.P.C.* 532 F.2d 177 (10th Cir. 1976); *Monsanto Co.* v. *F.P.C.*, 463 F.2d 799 (D.C. Cir. 1972) *International Paper Co.* v. *F.P.C.*, 476 F.2d 121 (5th Cir. 1973); *City of New Orleans, La.* v. *United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D.La. 1974); and *Rowan* v. *Allied Chemical Corp.*, 39 F.P.C. 64 (1968).

In light of these applicable and controlling decisions on point, the Louisiana state district court, the

Louisiana court of appeal, the Louisiana Supreme Court, the United States district court for the western district of Louisiana, the Federal Power Commission and the Federal Energy Regulatory Commission have unanimously and correctly determined that the Louisiana courts had the jurisdiction and authority to resolve and adjudicate the instant breach of contract and damage dispute between Respondents and Arkla.

Arkla, in its petitions to this Court, has very conveniently failed to mention that, in light of the above cited applicable and controlling cases, Arkla itself invoked the original jurisdiction of the Louisiana state courts over the instant breach of contract and damage case by virtue of its "Petition-In-Reconvention For a Declaratory Judgment" and its "Motion for Separate Trials For The Breach of Contract and Quantum of Damages Issues". Arkla, after having vigorously tried and lost on the merits of all of the factual and contractual issues presented in this case, simply wants an "encore" in still another forum. Obviously, Arkla has had its days in court with respect to the merits of this case and had Arkla prevailed in the Louisiana state courts on the merits of its theories, allegations and demands as set forth in its "Petition-in-Reconvention For A Declaratory Judgment", Arkla would not be presently attacking the numerous and consistent jurisdictional determinations as previously and correctly made by the six tribunals in connection with this case.

In that Arkla's belated complaint with respect to these jurisdictional decisions is contrary to the applicable and controlling decisions of this Court, numerous other courts and the F.P.C. itself, it was properly rejected and discredited by all of the Louisiana courts

below, the United States district court for the western district of Louisiana, the Federal Power Commission and the Federal Energy Regulatory Commission in connection with the instant breach of contract and damage dispute between Respondents and Arkla.

IV.

ARKLA'S COMPLAINT WITH RESPECT TO THE LOUISIANA COURTS' INTERPRETATION OF THE 1952 CONTRACT AND RESOLUTION OF THE BREACH OF CONTRACT AND LIABILITY ISSUE IN THIS CASE.

Arkla, in complaining about the Louisiana courts' interpretation of the "favored nations" clause as contained in the 1952 contract based upon the true *intent* of the parties when they perfected the contract on January 11, 1952 and, thus, their unanimous resolution and adjudication of the breach of contract and liability issue adversely to Arkla, completely disregards ordinary rules and principles of contract law and the duties of courts in interpreting contracts to reflect the true *intent* of the parties who confect any specific contract. Moreover, Arkla in this proceeding has studiously avoided discussing the overwhelming *evidence* relating to the true *intent* of the parties in this case and its *own* contractual agreements with the United States Government[8] under which Arkla in its dual capacity as a pipeline purchaser and the owner of a pipeline system in the Sligo gas field "purchased", "acquired" and "paid for" the United States

[8] See: Section 2(n) of Arkla's 1961 Protective Lease Contract with the United States Government *and* Arkla's November 15, 1962 letter contract with the United States Government.

Government's share of the residue royalty gas *and extracted liquid hydrocarbons, gasoline and plant products as produced from the same Sligo gas field and delivered into Arkla's same Sligo pipeline system from 1961 through 1975 at "prices" substantially higher than Arkla "paid for" Respondents' share of the residue royalty gas, working interest gas and* extracted liquid hydrocarbons, gasoline and plant products as produced from the same Sligo gas field and delivered into Arkla's same Sligo pipeline system from 1961 through 1975; i.e. the relevant *evidence* upon which the Louisiana courts properly based their resolution of the breach of contract and liability issue in this case.

Further, Arkla for obvious reasons has completely ignored and disregarded in this proceeding and in No. 78-986 the precise factual findings and legal conclusions of the Louisiana courts in determining the true *intent* of the parties to the 1952 contract based upon actual *evidence* adduced at the trial of this case on its merits.

The Louisiana courts' unanimous resolution and adjudication of the breach of contract and liability issue by applying well established principles of ordinary contract law to the *evidence* relating to the true *intent* of the parties is wholly consistent with the just and proper decisions as rendered by the fair and impartial courts under similar circumstances in *Eastern Petroleum Co., et al* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971). Further, the F.E.R.C. in its May 18, 1979 "Order Declining Jurisdiction" after reviewing the judgments of the Louisiana courts in the

breach of contract and damage case correctly concluded and confirmed that:

> "The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract."

Moreover, the F.E.R.C., after thoroughly reviewing the judgments of the Louisiana courts and specifically their determination of the true *intent* of the parties under the "favored nations" clause, concluded that the judgments did *not* "adversely affect its regulatory responsibility" under the Natural Gas Act to protect the "relevant public interest" against *excessive prices* for residue natural gas as sold in interstate commerce from 1961 through 1975. Indeed the Commission's applicable and maximum area rate ceilings for Respondents' residue natural gas as sold in interstate commerce fully protect the "relevant public interest", especially under the circumstances of this case where Respondents' contractually authorized and severable prices for their residue natural gas, which Respondents did not receive due to Arkla's continued breach of contract and effective concealment of the true facts from 1961 through 1975, were consistently *below* the Commission's applicable and lawful area rate ceilings from 1961 through 1975. Clearly, a judicial determination of the true *intent* of the parties who on January 11, 1952 perfected the subject contract and contractually agreed to be bound by the "favored nations" clause as contained therein as based upon the *evidence* in this case did *not* present or involve any real or substantial federal question that should have been deferred to the primary and exclusive jurisdiction of the F.P.C. and F.E.R.C.

V.

ARKLA'S COMPLAINT WITH RESPECT TO THE QUANTUM OF COMPENSATORY DAMAGES AS AWARDED RESPONDENTS BY THE LOUISIANA COURTS FOR THE ACTUAL LOSSES CAUSED BY ITS CONTINUED BREACH OF CONTRACT FROM 1961 THROUGH 1975.

Without question or dispute, Arkla, as Respondents' contractual obligor under the "favored nations" clause as contained in the 1952 private gas sales contract, had under well established Louisiana state contract law[9] a continuing contractual obligation and an affirmative legal duty to timely *cooperate* with Respondents and to prospectively do everything necessary, both expressly and impliedly necessary, to insure that Respondents received the legal fruits and contractual benefits of their "favored nations" rights in a manner fully consistent with the true *intent* of

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[9] Articles 1901, 1903 and 1930 of the Louisiana Civil Code:

"*Art, 1901.* Agreements legally entered into have the effect of laws on those who have formed them.
They can not be revoked, unless by mutual consent of the parties, or for causes ecknowledged by law.
They must be performed with good faith.

Art. 1903. The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect.

Art. 1930. The oblitations of contract [contracts] extending to whatsoever is incident to such contracts, the party who violated them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default."

the contract and all applicable laws, rules and regulations from 1961 through 1975. After five years of extended, burdensome and protracted litigation, it has now been definitively established and confirmed that Arkla wrongfully injured and damaged the fifteen individual Respondents herein from 1961 through 1975 by continuously breaching and violating Respondents' private legal and contractual rights under the 1952 private gas sales contract and applicable Louisiana state contract law in the same wrongful manner that other fair and impartial courts have also consistently found that Cities Service Gas Company, Gulf Oil Corporation, Kerr-McGee Corporation and Louisiana-Nevada Transit Company for their own corporate and self-serving purposes also wrongfully injured and damaged other innocent, injured and aggrieved contractual obligees by wrongfully breaching and violating similar private gas sales contracts and applicable state contract law. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); and *Louisiana-Nevada Transit Co.* v. *Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

The substantive law relative to a proper measure and award of compensatory damages for the actual losses and damages sustained and incurred by Respondents due to Arkla's continued breach of contract and effective concealment of all of the true, relevant and material facts from Respondents from 1961

through 1975 is well settled. This Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), recently confirmed that:

> "And where a legal injury is of an economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been commited.'-*Wicker* v. *Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867).*' "

See, also: *Meltzer* v. *Roof Coatings, Inc.* 536 F.2d 663 (5th Cir. 1976); *Nat Harrison Associates, Inc.* v. *Gulf States Utilities,* 491 F.2d 578, rehearing denied 493 F.2d 1405 (5th Cir. 1974); *Fogel* v. *Feazel,* 10 So.2d 695 (La.S.Ct. 1942); *Friedman Iron & Supply Co.* v. *J. B. Beaird Co.,* 63 So.2d 144 (La.S.Ct. 1953); *Corpus Juris Secundum,* Vol. 25 Damages, §74, p. 843; *Corbin on Contracts,* §§1029 and 1088; *Restatement of the Law of Contracts,* §329, *McCormick on Damages,* §137, p. 560; and *3 Williston on Sales,* §599, p. 293.

This same well established rule and principle of substantive law relative to the proper measure and award of compensatory damages due for actual losses caused by the breach and violation of private contractual rights has also been consistently applied to other breach of contract and damage cases involving private gas sales contracts. See: *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied,* 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976); *Eastern Petroleum Co.* v.

Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); and *Louisiana-Nevada Transit Co.* v. *Dalton J. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

The F.P.C., as "a collaborative instrumentality of justice" in the related proceeding of "*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI76-28, Federal Power Commission", on November 8, 1976 issued a clarifying "Order" which expressly set forth the facts and legal parameters necessary for the proper assessment and computation of the actual losses and damages which Arkla wrongfully caused Respondents to sustain and incur from 1961 through 1975 with respect to both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas as delivered and sold to Arkla from 1961 through 1975. In again deferring the instant breach of contract and damage dispute between Respondents and Arkla to the Louisiana state courts, the F.P.C. in its November 8, 1976 clarifying "Order" (Exhibit D-59) expressly clarified and confirmed what Respondents *would* and *could* have lawfully received and obtained, if contractually and severably authorized, for their residue natural gas *and* their extracted liquid hydrocarbons, gasoline and plant products as sold to Arkla from 1961 through 1975, *had* Arkla *not* continuously breached and violated their private legal and contractual rights and *had* Arkla *not* effectively obstructed, prevented and precluded Respondents from timely implementing and effectuating their private legal and contractual rights in a manner consistent with the true *intent* of the contract and all applicable laws, rules and regulations from 1961 through 1975. Specifically, the

F.P.C. in its November 8, 1976 "Order" correctly and properly clarified and confirmed that:

> "Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through tha year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its '*Other Southwest Area Rate*' Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From January 1,1965 Thru September 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

> Where, as here, the sale contract provides for the sale of natural gas as the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.
>
> Respondents also request that the Commission set forth and state:
>
> 'I. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contractually authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952

> 'Most Favored Nation' contract and the related Arkansas Louisiana Gas Company division order contracts.'
>
> While the Commission has jurisdiction over natural gas containing *liquefiable* hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jursidiction to decide this contractual issue. . .
>
> The Commission's Order Denying Application for Rehearing issued June 4, 1976, in the above-entitled docket number, is hereby clarified and amplified as set forth in the body of this order."

Arkla, based upon the data and information as contained in its *own* files and records, has repeatedly represented, estimated and conceded that, if Respondents prevailed upon the breach of contract and liability issue in this case, Respondents' recovery of compensatory damages with respect to the actual losses and damages attributable to both their extracted liquid hydrocarbons, gasoline and plant products *and*

their residue natural gas from 1961 through 1975 should be not more than "*a maximum of $3,500,000.00*". Respondents in connection with the data and information as judicially discovered and extracted from Arkla's *own* files and records and the F.P.C.'s November 8, 1976 clarifying "Order" have consistently computed their actual losses and damages attributable to both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas from 1961 through 1975 at a minimum of $2,809,199.08.

The Louisiana Supreme Court in resolving and adjudicating the "quantum of damages issue" in this case properly took judicial notice of and adhered to the F.P.C.'s November 8, 1976 clarifying "Order" and the Commission's lawful area rate ceilings in measuring and awarding Respondents compensatory damages for the actual losses caused and incurred due to Arkla's continued breach of contract and wrongful witholding and effective concealment of all of the true facts from Respondents from 1961 through 1975. Specifically, the Louisiana Supreme Court in its March 5, 1979 judgment held and concluded that:

> "At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and if proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. . . It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

Footnote 7: We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

The Louisiana state district court, on remand from the Louisiana Supreme Court and in light of: (i) the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59); (ii) the March 5, 1979 judgment of the Louisiana Supreme Court; (iii) substantive contract law; and (iv) the "quantum of damages" evidence in this case, on May 17, 1979 awarded the fifteen Respondents herein compensatory damages in the aggregate sum of $2,738,888.40 for all of the actual losses attributable to both their extracted liquid hydrocarbons, gasoline and plant products *and* their residue natural gas from 1961 through 1975. While the Louisiana state district court did *not* allocate its award of compensatory damages between the actual losses attributable to Respondents' extracted liquid hydrocarbons and plant products from 1961 through 1975 as opposed to the actual losses attributable to Respondents' residue natural gas from 1961 through 1975, the evidence in the case supports and confirms that approximately 45% of the compensatory damages are attributable to the actual losses with respect to Respondents' extracted liquids, gasoline and plant products *and* 55% of the compensatory damages are attributable to the actual losses with respect to Respondents' residue natural gas.

Arkla in this proceeding *cannot* contest or dispute the fact that Respondents actually lost at least $2,738,888.40 up to "*a maximum of $3,500,000.00*" due to its continued breach of contract and effective concealment of all of the true facts from Respondents from 1961 through 1975. Arkla's bottom line complaint with respect to the Louisiana courts' award of compensatory damages in this case is that Arkla should *not* be required to respond in compensatory

damages for that portion of Respondents' actual losses and damages attributable to their residue natural gas from September, 1961 through September, 1972. Arkla's legal theory of a partial unjust enrichment at Respondents' loss, damage, detriment and expense is entirely based and predicated upon the unconscionable fact that Arkla wrongfully prevented and absolutely precluded Respondents from timely preparing and prospectively filing routine notices setting forth their contractual entitlement to higher prices for their residue natural gas with the F.P.C. under section 4(d) of the Natural Gas Act from September, 1961 through September, 1972. In that Arkla's last alternative defense, even in theory, only relates to Respondents' legal entitlement to a recovery of compensatory damages for the actual losses and damages attributable to Respondents' residue natural gas from 1961 to 1972 and does not, even in theory, relate to Respondents' recovery of compensatory damages for the actual losses and damages attributable to Respondents' extracted liquid hydrocarbons and plant products from 1961 through 1975 or Respondents' actual losses and damages attributable to Respondents' residue natural gas from October, 1972 through December, 1975, all further discussion in this section will deal solely with Respondents' legal right to recovery compensatory damages for the actual losses and damages attributable to their residue natural gas from September, 1961 through September, 1972 (the period prior to the time Respondents became administratively classified as "small producers").

Clearly, the true purpose of section 4(d) of the Natural Gas Act was from 1961 to 1972 to assist the Commission in protecting the "relevant public interest" against Respondents' obtaining *excessive prices*

for their residue natural gas as sold to Arkla in interstate commerce from September, 1961 through September, 1972. Obviously, section 4(d) was predicated on the assumption that Arkla would timely honor its contractual obligations to Respondents from 1961 to 1972 and that Arkla would timely *cooperate* with Respondents in prospectively making any necessary filings with the Commission with regard to their contractual entitlement to higher prices for their residue natural gas, which contractually authorized prices were substantially *below* the Commission's applicable, maximum, lawful, just and reasonable area rate ceilings, and *would*, therefore, have been automatically approved by the Commission, as confirmed in the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59). Certainly, section 4(d) was never designed or intended to be improperly used as a *tool* or a *shield* by Arkla or any other pipeline company for the purpose of their own unjust enrichment and for unilaterally evading and escaping their legitimate contractual duties and obligations.

While section 4(d) does *not* anticipate or address the situation presented here, the F.P.C. in its November 8, 1976 clarifying "Order" (Exhibit D-59) properly clarified and correctly confirmed what *would* and *could* have lawfully happened *had* Arkla *not* breached and violated Respondents' contractual rights from 1961 through 1975 and *had* Arkla *not* wrongfully prevented and precluded Respondents from timely and prospectively filing notices setting forth the increased prices which Respondents were contractually entitled to receive for their residue natural gas from September, 1961 through September, 1972 with the Commission from September, 1961 through September, 1972.

In light of the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59), it is an undeniable fact that Respondents "*would*" and "*could*" have lawfully obtained and received their contractually authorized prices for their residue natural gas as sold to Arkla from 1961 to 1972, which were *below* the Commission's established and approved lawful area rate ceilings, *had* Arkla *not* breached the contract for fourteen years and effectively concealed all of the true facts from Respondents for fourteen years. Again, as confirmed by the F.P.C. in connection with this specific breach of contract and damage case:

> "The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January, 1965	From January 1, 1965 Thru September 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 pisa	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

> Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery."

As now unanimously and definitively established by *all* of the courts below after five years of litigation, Respondents were from 1961 to 1972 contractually entitled to receive from Arkla the same prices for their

residue natural gas that the United States Government received from Arkla for its residue natural gas as delivered and sold to Arkla, to wit:

Sept. 1961 thru Dec. 1961	Jan. 1962 thru Dec. 1966	Jan. 1967 thru Sept. 1972
$0.117432 per Mcf at 15.025 pisa	$0.130252 per Mcf at 15.025 psia	$0.140508 per Mcf at 15.025 psia

As confirmed by the evidence herein, Respondents, due to Arkla's continued breach of contract and effective withholding and concealment of all of the true, relevant and material facts from Respondents for fourteen years, received the following prices for their residue natural gas as delivered and sold to Arkla from 1961 to 1972, to wit:

Sept. 1961 thru Dec. 1961	Jan. 1962 thru Dec. 1966	Jan. 1967 thru Sept. 1972
$0.08547 per Mcf at 15.025 pisa	$0.09446 per Mcf at 15.025 psia	$0.10346 per Mcf at 15.025 psia

Therefore, in light of the F.P.C.'s November 8, 1976 clarifying "order" (Exhibit D-59) and the evidence in this case, it follows a fortiori that Respondents wrongfully sustained and incurred substantial losses and damages with respect to their residue natural gas from 1961 to 1972 due to the fact that Arkla by virtue of its own continued breach of contract and wrongful concealment of the true facts from Respondents for fourteen years effectively prevented and absolutely precluded Respondents from prospectively making routine notice filings with the Commission from 1961 to 1972.

Thus, with respect to that portion of Respondents' actual losses and damages attributable to their residue natural gas from 1961 to 1972, the question as presented to the Louisiana Supreme Court below was whether Arkla as the wrongdoer could escape and evade its independent legal obligation to respond in compensatory damages for this portion of Respondents' actual losses and damages because Arkla had wrongfully made it absolutely impossible for Respondents to timely and prospectively comply with the routine filing requirements of section 4(d) of the Natural Gas Act from 1961 to 1972.

The Louisiana Supreme Court by applying the well established rules and principles of law, equity and justice as contained in Article 2040 of the Louisiana Civil Code, as consistently applied and enforced by that court in numerous other cases, held that Arkla as the wrongdoer was legally *estopped* to assert an affirmative defense to Respondents' action for damages for breach of contract based upon the unconscionable fact that Arkla had wrongfully prevented and precluded Respondnets from prospectively complying with the routine notice filing requirements of section 4(d) of the Natural Gas Act from September, 1961 through September, 1972.

In this connection the Louisiana Supreme Court expressly took note of the F.P.C.'s November 8, 1976 clarifying "Order" and the fact that Respondents' contractually authorized prices "*would*" have automatically been approved by the F.P.C. because they were *below* the Commission's maximum and lawful area rate ceilings. The decision of the Louisiana Supreme Court on this point of "*estoppel*" is

fully consistent with well established rules and fundamental principles of law, equity and justice as heretofore consistently applied and enforced by this Court and all other courts of this Nation. See, e.g., *United States* v. *Peck.* 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance. . . It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

Numerous other examples of the affirmative application of this fundamental and unquestioned principle of law, equity and justice can be cited, see also, *e.g., R. H. Stearns Co.* v. *United States,* 391 U.S. 54 (1934); *Dietrick* v. *Greaney,* 309 U.S. 190 (1940); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931); *Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975); *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973); *Perrin* v. *Rodriguez,* 153 So. 555 (La. 1934); *Ohasi* v. *Verit Industries,* 536 F.2d 849 (9th Cir. 1976); *Watson Bros. Transportation Co.* v. *Jaffa,* 143 F.2d 340 (8th Cir. 1944); *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.,* 361 F.2d 791 (6th Cir. 1966); *Peter Kiewit Sons' Co.* v. *Summit Construction Co.,* 422 F.2d 242 (8th Cir. 1969); *Christenson* v. *Felton,* 322 F.2d 323 (9th Cir. 1963); and *George W. Garig Transfer* v. *Harris,* 75 So.2d 27 (La.S.Ct. 1954).

See also, *17A C.J.S., Contracts,* §468b (1963); *Restatement of Contracts,* §§294 and 295 (1932); and *5 S. Williston, Contracts,* §677 (3rd ed. 1961).

Contrary to Arkla's erroneous and self-serving contentions in this proceeding, these same well established rules and fundamental principles of law, equity

and justice have likewise heretofore been properly applied to cases involving the breach and violation of private gas sales contracts that covered the sale of natural gas in interstate commerce and were on file with the F.P.C. pursuant to the Natural Gas Act in order to legally "*estop*" a wrongdoer from taking advantage of innocent parties by virtue of its *own* breach of contract and legal wrongdoing. See: *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), *appeal dismissed* and *certiorari denied*, 409 U.S. 1052 (1972); and *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976).

Arkla's unconscionable contention that it as Respondents' contractual obligor can legally rely upon and take advantage of its *own* continued breach of contract and its *own* wrongful withholding and effective concealment on all of the true facts from Respondents for fourteen years in order to "shield" itself from its legal obligation to respond in compensatory damages for that portion of the actual losses attributable to Respondents' residue natural gas from 1961 to 1972 is contrary to very basic and fundamental principles of law, equity and justice. The Louisiana Supreme Court, in correctly recognizing Arkla's separate and independent legal obligation to respond in compensatory damages out of its own private and corporate profits for all of the actual losses and damages caused by Arkla's continued breach and violation of Respondents' private contractual rights and by applying well established rules and fundamental principles of law, equity and justice to the true facts an circumstances of the instant case, properly held that Arkla as the wrongdoer was *estopped* from asserting

this alternative defense based upon its own wrongful breach of contract and effective concealment of the true facts from Respondents for fourteen years.

Clearly, Arkla as the wrongdoer that wrongfully prevented and precluded Respondents from prospectively making the routine notice filings as required by section 4(d) from 1961 to 1972 was properly *not* permitted to take advantage of its own continued breach of contract and wrongdoing. Certainly, Arkla's continued breach of contract and wrongful concealment of all of the true facts from Respondents from 1961 to 1975 constitutes a valid legal "excuse" for Respondents having failed to prospectively file the notices with respect to their residue gas with the Commission from 1961 to 1972. Just as certainly, the fifteen individual Respondents herein should *not* to their loss, damage, detriment and expense be the victims of the fact that Arkla wrongfully rendered it absolutely impossible for them to prospectively comply with the notice filing provisions of section 4(d) of the Natural Gas Act from 1961 to 1972.

The Louisiana Supreme Court in measuring Respondents' actual losses and damages attributable to their residue natural gas from September, 1961 through September, 1972, as well as from October, 1972 through December, 1975, had to and did with the aid of the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) determine what Respondents as severably and contractually authorized *would* and *could* have lawfully received for their residue natural gas in a manner consistent with the rules and regulations of the F.P.C. (specifically the Commission's applicable and lawful area rate ceilings) *had* Arkla *not*

continuously breached the contract, effectively withheld and concealed all of the true facts from Respondents for fourteen years and wrongfully obstructed, prevented and precluded the timely performance and fulfillment of the Respondents' private contractual rights from 1961 through 1975.

Arkla's oblique contention that the Louisiana Supreme Court in relying upon the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) improperly usurped the F.P.C.'s exclusive authority to determine and fix maximum lawful area rates for the sale of natural gas in interstate commerce is a completely erroneous smoke screen and wholly without merit. Certainly, the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) constituted proper and competent evidence for the Louisiana court's use in measuring Respondents' actual losses and damages from 1961 through 1975 in the Louisiana breach of contract and damage case. Further, the Louisiana Supreme Court's taking cognizance of and reliance upon the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) correctly reflects a recognition of the "federal supremacy" of the Commission's maximum and lawful area rate ceilings for residue natural gas as sold in interstate commerce.

In that the compensatory damages as awarded the fifteen individual Respondents herein by the Louisiana courts were substantially *below* Arkla's own estimate of Respondents' recoverable damages at "*a maximum of $3,500,000.00*", clearly Arkla as the wrongdoer in this case has no real or substantial basis for complaint. Further, in light of the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) and the

F.E.R.C.'s reconfirmation of the fact that the Louisiana Supreme Court's March 5, 1979 judgment does *not* "adversely affect" the "relevant public interest" against *excessive prices* for residue natural gas sold in interstate commerce, it is clear that the Louisiana Supreme Court's March 5, 1979 judgment involves and affects only Arkla's private unjust enrichment as wrongfully obtained by Arkla from 1961 through 1975 at Respondents' loss, damage, detriment and expense.

VI.

THE SUPREME COURT OF LOUISIANA'S MARCH 5, 1979 JUDGMENT DOES FUNDAMENTAL JUSTICE TO THE INJURED AND DAMAGED RESPONDENTS HEREIN AND DOES NOT VIOLATE OR CONFLICT WITH THE REGULATORY PURPOSE OF THE NATURAL GAS ACT TO PROTECT THE RELEVANT PUBLIC INTEREST AGAINST EXCESSIVE PRICES FOR RESIDUE NATURAL GAS AS SOLD IN INTERSTATE COMMERCE.

The compensatory damages as awarded to the fifteen Respondents herein by virtue of the Louisiana Supreme Court's March 5, 1979 judgment will in accordance with well established rules and fundamental principles of law, equity and justice do nothing more than to compensate Respondents for their actual losses and to place Respondents in the same position that Respondents *would* and *could* have lawfully been in *had* Arkla *not* continuously breached the contract and wrongfully obstructed, prevented and precluded the prospective performance and fulfillment of the contract in a manner fully consistent with *all* applicable laws, rules and regulations from 1961 through 1975.

Arkla's payment of compensatory damages out of its *own* corporate profits for Respondents' actual losses and damages will constitute nothing more than a return of the private unjust enrichment that Arkla has wrongfully obtained at Respondents' loss, damage, detriment and expense from 1961 through 1975 and will clearly *not* adversely affect any "relevant public interest". Further, the Louisiana Supreme Court's holding that Arkla as the wrongdoer is *estopped* from relying upon its *own* wrongdoing and continued breach of contract for fourteen years in order to partially unjustly enrich itself at Respondents' loss, damage, detriment and expense from 1961 to 1972 is also in complete accord with well established rules and fundamental principles of law, equity and justice as repeatedly recognized, confirmed and enforced by this Court and all other courts of this Nation.

Without question or dispute the primary purpose of the Natural Gas Act is to protect the "relevant public interest" against *excessive prices* for residue natural gas as sold in interstate commerce, but that issue as conclusively determined by the United States, the F.E.R.C. and F.E.R.C.'s staff counsel is not adversely involved or affected in this case. In order to properly protect this "relevant public interest", the Commission has with respect to Respondents' residue natural gas as produced from North Louisiana and sold in interstate commerce from 1961 through 1975 previously adopted, established and approved maximum, lawful, just and reasonable area rate ceilings[10] up to which Respondents *would* and

[10] See: "Statement of General Policy 61-1", 24 F.P.C. 818; and Other Southwest Area Rate Order Nos. 607 and 607-A, 18 C.F.R. §§154.109 and 154.109a.

could have lawfully collected as contractually authorized for their residue natural gas sold to Arkla from 1961 through 1975 *but for* Arkla's continued breach of contract and effective withholding of all of the true facts from Respondents for fourteen years. The Commission's applicable and lawful area rate ceilings are not at issue or disputed in this case and it is now conceded that Respondents' contractually authorized prices were from 1961 through 1975 *below* the Commission's applicable and lawful area rate ceilings and, hence, were not in violation of or in conflict with the "relevant public interest".

With respect to the severable and contractually authorized prices that Respondents *would* and *could* have received for their extracted liquid hydrocarbons, gasoline and plant products from 1961 through 1975 *but for* Arkla's continued breach of contract and effective withholding and concealment of all the true facts from Respondents for fourteen years, both the F.P.C., in its November 8, 1976 clarifying "Order", *and* the F.E.R.C., in its April 25, 1979 "Order" and its May 18, 1979 "Order", have in light of the applicable authorities[11] consistently confirmed that the Commission has *not* from 1961 through 1975 regulated, limited or restricted the severable prices which Respondents as contractually authorized *would* and *could* have received and collected for their extracted liquid hydrocarbons, gasoline and plant products as sold to Arkla under the 1952 contract and Arkla's

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[11] See: *Phillips Petroleum Company* v. *Texaco, Inc.*, 415 U.S. 125 (1974); *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971); *Mobil Oil Corporation* v. *F.P.C.*, 483 F.2d 1238 (D.C. Cir. 1973); and *Rowan* v. *Allied Chemical Corp.*, 39 FPC 64 (1968).

related division order contracts from 1961 through 1975, *but for* Arkla's continued breach of contract for fourteen years.

After the Louisiana Supreme Court rendered its March 5, 1979 judgment, a copy of that judgment was lodged with the F.E.R.C. in the related proceeding, "*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al,* Docket No. RI76-28, Federal Energy Regulatory Commission." As evidenced by the Commission's April 25, 1979 "Order", its May 18, 1979 "Order Declining Jurisdiction", and the Commission's staff counsel's "Supplemental Memorandum Addressing Decision of Louisiana Supreme Court" dated April 16, 1979, it is clear that the F.E.R.C. and its staff counsel have thoroughly reviewed and analyzed the Louisiana Supreme Court's March 5, 1979 judgment in order to make certain that the portion of compensatory damages awarded Respondents with respect to the actual losses attributable to their residue natural gas from 1961 through 1975 were *not* measured by contractually authorized prices which *exceeded* the Commission's applicable and lawful area rate ceilings. After the F.E.R.C. thoroughly reviewed the Louisiana Supreme Court's March 5, 1979 judgment, the F.E.R.C. in its April 25, 1979 "Order" noted that:

> "To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.

The Supreme Court of Louisiana stated in an opinion in a parallel case[1] that:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

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[1] *Frank J. Hall, et al.* v. *Arkansas-Louisiana Gas Company,* No. 62,560, March 5, 1979, p. 12, n.7.

The trial court in Louisiana stated.[2]

> The evidence demonstrates that the price paid to the United Stat~s per Mcf of gas was below the maximum area rate . . .

Hall v. *Arkansas-Louisiana Gas Company,* 1st Judicial District Court, Caddo Parish, Louisiana; No. 225,699, October 14, 1977."

This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.

The Commission therefore orders:

(A) Hall, *et al.* to file with this Commission within ten days:

(1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;

(B) The parties to these proceedings to file with the Commission within ten days:

(1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts

> decided that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana Courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; . . .

Further, after the F.E.R.C. reviewed the Louisiana Supreme Court's March 5, 1979 judgment and the "quantum of damage" evidence as provided by both Arkla and Respondents pursuant to its April 25, 1979 "Order," the Commission in its May 18, 1979 "Order Declining Jurisdiction" concluded that:

> "The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract . . .
>
> On April 25, 1979, we issued an "Order Requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8,

1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate . . .

On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group

would have been entitled if contractually authorized and if proper filing procedures had been followed. The Supreme court of Louisiana further stated:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above."

Further, the F.E.R.C. and the United States in their "Amici Curiae Brief" as filed in Docket No. 78-986 at pages 12, 14, 15 and 16 after reveiw of the Louisiana Supreme Court's March 5, 1979 judgment stated:

> "The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See *e.g., Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968). However, absent adverse effects on the

interests protected by the regulatory scheme—for example, prices in excess of established ceilings—the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law * * * *.' *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 673 (1950) . . .

Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case . . .

The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States* v. *Radio Corporation of America, supra,* 385 *.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act. Under the National Gas Act and well established federal law, jurisdictional sellers of gas are entitled only to rates set forth in their filed rate schedules or (to the extent they are excused from filing such schedules) under their contract pricing provisions, but in no event in excess of Commission established ceilings . . .

Since the measure of damages claimed turned on lease payments to the United States which did

> not exceed Commission applicable area ceilings (App., *infra*, 15a); there was no question concerning the reasonableness of the rates for the Commission to consider."

Thus, the United States, the F.E.R.C. and F.E.R.C.'s staff counsel after carefully and thoroughly reviewing the Louisiana Supreme Court's March 5, 1979 judgment and the relevant "quantum of damages" evidence as presented to that court, have again conclusively confirmed that the Louisiana court's award of compensatory damages for the actual losses attributable to Respondents' residue natural gas from 1961 to 1972, as well as from 1972 through 1975, were properly measured by Respondents' contractually authorized prices, which they did *not* receive because of Arkla's continued breach of contract for fourteen years, that were consistently *below* the Commission's applicable and approved maximum, lawful, just and reasonable area rate ceilings for these specific periods of time.

With respect to the Louisiana Supreme Court's award of compensatory damages for the actual losses attributable to Respondents' extracted liquid hydrocarbons, gasoline and plant products from September, 1961 through December, 1975 *and* the actual losses attributable to Respondents' residue natural gas from October, 1972 through December, 1975, the United States, the F.E.R.C. and its staff counsel after having reviewed the Louisiana Supreme Court's judgment of March 5, 1979 confirmed its approval of that portion of the damage judgment.

However, the United States, the Commission and its staff counsel suggested, erroneously Respondents respectfully submit, that technically the Louisiana

Supreme Court's award of compensatory damages for the actual losses attributable to Respondents' residue natural gas from September, 1961 through September, 1972 was in "conflict" with the Commission's prospective notice filing requirements under section 4(d) of the Natural Gas Act for the period prior to Respondents having been administratively classified as "small producers" (October, 1972). Further, the United States, the F.E.R.C. and its staff counsel suggested that Respondents should not recover their compensatory damages for the actual losses attributable to their residue natural gas from 1961 to 1972 "*unless or until [Respondents] seek and obtain waiver of the requirements*" for prospective notice filings under section 4(d) or until "*they are excused from filing such schedules*". Specifically, the Commission in its May 18, 1979 "Order Declining Jurisdiction After Reconsideration of the Issue on Remand" noted:

> "As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine."

The Commission's staff counsel in addressing this same point in its "Supplemental Memorandum of Commission Staff Addressing Decision of Louisiana Supreme Court" dated April 16, 1979, concluded that:

> "The question of whether to waive the filing requirement of §4(d) of the Natural Gas Act under these circumstances is within the primary jurisdiction of the Commission. Moreover, it is important, we believe, for the Commission to exercise its jurisdiction in this case insofar as it relates to the filing requirements under the Natural

Gas Act and the Commission's regulations pertaining thereto. Aside from the Commission's expertise in such matters, the decisions on these issues should be consistent.[5]

The Commission is reconsidering the prior orders issued by the FPC in this proceeding which have been remanded from the U.S. Court of Appeals. Hall has not requested in this proceeding that the Commission waive the filing requirements of §4(d) of the Natural Gas Act. Therefore, it would be appropriate for the Commission, in addition to asserting that it has primary jurisdiction, to reassert the position taken by the FPC in its June 4, 1976 order in this proceeding that Hall is not entitled prior to October 10, 1972 to any rate in excess of that on file with the Commission and in effect under its FERC Gas Rate Schedule No. 4 unless or until it seeks and obtains waiver of the requirements. Staff adheres to the position taken in its brief that it is unnecessary for the Commission to exercise its primary jurisdiction to determine whether the favored nation clause at issue here has been triggered.

[5] The Court's decision in *Cities Service Gas Co.* v. *FPC*, 535 F2d 1278 (D.C. Cir. 1976) is inapplicable here. The Court in affirming the Commission there held that, where a state court awarded damages for breach of an implied contractual obligation to cooperate with an abandonment application filed with the Commission, the doctrines of *res judicata* and equitable estopel did not apply in a producer unilateral rate filing proceeding involving the same contract, because the implied contractual obligation was different from obligations under the Natural Gas Act. Unlike *Cities Service*, damages were awarded by the Louisiana Court for breach of the obligation to pay the contract price, rather than for breach of an implied obligation. Such rate obligations are subject to the requirements of the Natural Gas Act."

Respondents respectfully submit that under proper analysis of the F.P.C.'s and F.E.R.C.'s own "Orders"

there is no real or technical "conflict" between that portion of the Louisiana Supreme Court's damage judgment which compensates Respondents for the actual losses attributable to their residue natural gas from September, 1961 through September, 1972 and the actual "*public interest purpose*" of the prospective notice filing requirements under section 4(d) of the Natural Gas Act in light of the established and inescapable fact that the contractually authorized prices which Respondents *would* and *could* have received for their residue gas from 1961 to 1972 were substantially *below* the Commission's applicable and lawful area rate ceilings and that Arkla, as Respondents' contractual obligor, wrongfully obstructed, prevented and precluded Respondents from timely making the routine and technical notice filings from 1961 to 1972.

However, Respondents in order to remove and eliminate even a possible question or theoretical "conflict" have, pursuant to the suggestion and statements made by the Commission's staff counsel in their "Supplemental Memorandum Addressing Decision of Louisiana Supreme Court" dated April 16, 1979 and the F.E.R.C. in its May 18, 1979 "Order Declining Jurisdiction", formally filed "*An Application for a Waiver*" of the prospective notice filing requirements of section 4(d) of the Natural Gas Act from 1961 to 1972 in light of the inequitable and unjust fact that Arkla wrongfully prevented and absolutely precluded Respondents from prospectively making the routine notice filings from 1961 to 1972. A copy of Respondents' formal "*Application for a Waiver*" as filed with the F.E.R.C. on May 24, 1979, after Respondents concluded the Louisiana state court litigation which de-

finitively established and confirmed Arkla's wrongdoing and the legal validity of Respondents' private contractual rights, is attached hereto as Respondents' Appendix A. Respondents' "*Application for a Waiver*" as formally filed with the F.E.R.C. on May 24, 1979 is still pending.

The Commission's granting of Respondents' "*Application for a Waiver*", which it clearly should grant under the inequitable and unjust circumstances of this case and well established principles of law, equity and justice as consistently heretofore applied by the Commission and the courts in numerous other cases involving the failure to prospectively make certain notice filings[12], would completely remove, eliminate, and render moot any possible or theoretical contention that Respondents' recovery of compensatory damages for the actual losses attributable to their residue natural gas from September, 1961 through September, 1972 is under the circumstances of this case in "conflict" with the real "*public interest purpose*" of the prospective notice filing requirements of section 4(d) of the Natural Gas Act.

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[12] The Commission without question has the "*equitable power and authority*" to grant a "waiver" of the prospective filing requirements of section 4(d) of the Natural Gas Act under the circumstances of this case and has heretofore under other deserving circumstances consistently exercised its "*equitable power and authority*" to administer and effectuate "justice". See *Plaquemines Oil and Gas Co.* v. *F.P.C.*, 450 F.2d 1334 (D.C. Cir. 1971); *Central Maine Power Co.* v. *F.P.C.*, 345 F.2d 875 (1st Cir. 1965); *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153 (D.C. Cir. 1967); *Moss* v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975) at page 307, ft.nt. 17; *Montana Power Co.* v. *F.P.C.*, 330 F.2d 781 (9th Cir. 1964); and *Rowan* v. *Allied Chemical Corp.*, 39 F.P.C. 64 (1968).

As properly noted and correctly observed by the court in the case of *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 379 F.2d 153 (D.C. Cir. 1967):

> "... It is indeed a 'familiar principle of equity * * * to regard as being done that which should have been done.'
>
> The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice..."

As noted by the court in *Plaquemines Oil and Gas Co.* v. *Federal Power Commission*, 450 F.2d 1334 (D.C. Cir. 1971):

> "The question on this appeal is whether the Federal Power Commission, in retroactively applying the Natural Gas Act to sales of the Plaquemines Oil and Gas Company between 1961 and 1966, the years in which the Commission asserted jurisdiction over such sales and in which Plaquemines filed for certification, was justified in flatly requiring Plaquemines to refund all sums derived from a 1964 rate increase without first determining its validity. The Commission simply ruled that since Plaquemines' sales in 1964 were within the jurisdiction of the Commission and "a rate change pursuant to a contract escalation provision is forbidden inthe absence of compliance

with the filing provisions of the Act," the 1964 rate increase was without effect and the sums derived therefrom must be refunded. For reasons that follow we reverse and remand to the Commission. . .

III. Equitable Retroactive Application of the Act to Plaquemines

. . . Likewise, we do not hesitate to apply here the position we took with respect to comparable provisions of the Federal Power Act in Niagara Mohawk Power Corp. v. *FPC:* that the Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted (in this case about five years), has the equitable power "to regard as being done that which should have been done" by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act . . .

In this case, however, there appears to have been some confusion on the Commission's part in carrying out its purposes in retroactively applying the Act. Time and again in brief, the Commission reminds us that all it was doing with respect to Plaquemines' jurisdictional sales in the period 1961-1966 was recreating the past to reflect *compliance* with the Act. And indeed, with respect to sales made by Plaquemines in 1961 when Plaquemines should have filed for certification, the Commission did just that: it found that had Plaquemines filed under section 7 in 1961, the rate charged Tennessee would have been in compliance with the Act and hence no compensatory steps were required.

When it came to the 1964 rate increase, however, the Commission seems to have forgotten its original purpose: *reconstructing* Plaquemines' jurisdictional sales between 1961 and 1966 to reflect *compliance* with the Act . . .

We think that having started out to reconstruct Plaquemines' sales to reflect compliance with the Act, the Commission was bound to carry that purpose through in regard to all transactions that would have been the subjects of filings had Plaquemines been complying with the Act in the 1961-1966 period. Thus it was error to reject the 1964 rate increase without first attempting to determine whether the rate rise would have been accepted by the Commission had it been the subject of a post-adjustment filing in 1964.

We are at a loss to understand why this approach was eschewed in this case, particularly in view of evidence in the Commission's Supplemental Memorandum, filed after oral argument, showing that this course *was* followed in retroactively applying the Act to all 36 other restricted-use contracts over which jurisdiction of the Commission was extended in *Lo-Vaca*. No gas company involved in such contracts filed for certification until after the Supreme Court decision in 1965, and each restricted-use contract contained escalation clauses providing for rate increases between 1961 and 1965. Yet not one other gas company, though identically situated to Plaquemines, was required to refund sums resulting from such rate increases on the mere ground that they were not filed in accordance with section 4(d) of the Act."

Now that Respondents have definitively concluded the Louisiana breach of contract and damage case and now that Respondents have formally filed an "*Application for a Waiver*" of the prospective notice filing requirements of section 4(d) with the F.E.R.C., Respondents as citizens of this Nation have done everything that is humanly possible to achieve and obtain basic and fundamental justice in this case. If the F.E.R.C. believes that under the facts of this case the

Louisiana Supreme Court's application of Article 2040 of the Louisiana Civil Code and the doctrine of contract *estoppel* to Arkla's continued wrongdoing and breach of contract from 1961 to 1975 "conflicts" with its jurisdiction and authority to grant "waivers" under section 4(d) and its regulations (18 C.F.R. §154.98), then the F.E.R.C., as "an instrumentality of justice" and the successor of the F.P.C. which properly issued the November 8, 1976 clarifying "Order" (Exhibit D-59) as relied upon by the Louisiana Supreme Court, should in light of Arkla's continued breach of contract and misconduct for fourteen years promptly grant the formal "waiver" as formally requested by Respondents on May 24, 1979.

Certainly, the fact that Arkla wrongfully obstructed, prevented and precluded Respondents from timely and prospectively making the routine notice filings from 1961 to 1972 by effectively withholding and concealing all of the true, relevant and material facts from Respondents from 1961 through 1975 constitutes a valid legal "*excuse*" for Respondents' failure to timely file the notices from 1961 to 1972. Clearly, the inequitable and unjust reasons and factors that wrongfully obstructed, prevented and precluded Respondents from timely and prospectively filing notices of increases in their contractually authorized prices for their residue natural gas with the Commission from 1961 to 1972 under section 4(d) of the Natural Gas Act are far more compelling and inequitable than were the reasons and factors as to why Plaquemines Oil and Gas Company and the other *36* sellers failed to prospectively file notices of their contractually authorized price increases for their residue natural gas with the Commission from 1961 to 1966 under section 4(d) of the Natural Gas Act. Thus, without

question, the fifteen individual Respondents herein are under the factual circumstances of this case and well established rules of law, equity and justice entitled to the same "equitable" relief and "waiver" that was properly granted by the Commission and the courts to *Plaquemines Oil and Gas Company* and the other *36* sellers under the factual circumstances of those cases.

Again, the Commission's granting of the formal "waiver" would in light of the inequitable facts and circumstances of this case, the F.P.C.'s November 8, 1976 clarifying "Order" (Exhibit D-59) and other cases be entirely consistent, just and proper; and would certainly eliminate and properly render moot any possible or theoretical "conflict" between Respondents' recovery of compensatory damages for the actual losses attributable to their residue natural gas from 1961 to 1972 as measured by contractually authorized prices that were well *below* the Commission's applicable and lawful area rate ceilings *and* the "relevant public interest" against *excessive prices* for residue natural gas sold in interstate commerce, which "relevant public interest" as again conclusively confirmed by the United States, F.E.R.C. and its staff counsel is concededly *not* adversely involved or affected by the Louisiana Supreme Court's March 5, 1979 judgment in the instant breach of contract and damage case.

VII.

CONCLUSION

For the foregoing reasons, Arkla's petition for a writ of certiorari should be denied.

Respectfully submitted,

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July, 1979

APPENDIX

RESPONDENTS' EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RI76—28

ARKANSAS LOUISIANA GAS COMPANY
v.
FRANK J. HALL, et al.

APPLICATION OF RESPONDENTS FOR A WAIVER OF NOTICE REQUIREMENT PURSUANT TO SECTION 154.98 OF THE COMMISSION'S REGULATIONS

Pursuant to section 154.98 of the Commission's regulations, the fifteen individual respondents in this proceeding hereby apply for a waiver of the notice requirements of section 4(d) of the Natural Gas Act if the Commission believes that these requirements apply in the circumstances present here. As explained in detail below, timely compliance with section 4(d) was impossible because for fourteen years the only party that would have been interested in notice of rate changes withheld and concealed the facts that would have made timely notice possible. These facts were kept from respondents from 1961 through 1974, and subsequent litigation establishing their validity has only recently been concluded. Thus, respondents are now, for the first time, able to file the appropriate information with the Commission.

I.

This application pertains to a January 11, 1952 natural gas sales contract which was placed before the Commission by Arkansas Louisiana Gas Company ("Arkla"). The nature of the contract and the pertinent events subsequent to its execution have been set forth in the voluminous pleadings already filed in this proceeding and will only be

summarized here in extremely cursory fashion. In brief, the contract is between Arkla and respondents and in accordance with the contract and Arkla's related division order contracts respondents' dry or residue natural gas, liquid hydrocarbons, natural gasoline, and extracted plant products have been delivered and sold to Arkla. The contract contains a favored nations clause allowing for increased prices to be paid to respondents by Arkla under certain circumstances. In July 1974 a dispute between Arkla and respondents arose as to whether the favored nations clause had been triggered, thus contractually entitling respondents to higher prices for their production. The triggering event—a contractual arrangement between Arkla and the United States Government—was concealed by Arkla from respondents, who for fourteen years were wrongfully kept unaware of their contractual entitlement to higher prices for their dry or residue natural gas, liquid hydrocarbons, natural gasoline, and extracted plant products.

After the Commission in this docket refused Arkla's request to adjudicate the breach of contract and damage dispute and instead deferred to the Louisiana state courts, the Louisiana courts conducted a lengthy trial and determined that the favored nations clause had been breached and triggered for fourteen years. The courts also found that Arkla had during the period in question effectively concealed the true facts from respondents about its triggering of the favored nations clause and thereby made it impossible for respondents to file prospectively any changes in their rate schedules at the Commission with respect to their contractually authorized prices for their dry or residue natural gas as they otherwise would have done. Accordingly, the Louisiana Supreme Court has awarded compensatory damages to respondents measured by the contractually authorized prices that were due them from Arkla during the period in question (1961-1975) for their dry or residue natural gas, liquid hydrocarbons, natural gasoline, and extracted plant products.

In a memorandum in this proceeding dated April 15, 1979, Commission staff counsel suggested that damages should not be awarded with respect to respondents' dry or residue natural gas for the period from 1961 to 1972 (at which time respondents became "small producers" under the Commission's regulations) because they had failed to file timely notices of rate changes with the Commission. Commission staff noted that respondents had not in this proceeding filed for a waiver of the filing requirement with respect to their contractually authorized prices for their dry or residue natural gas from September 1961 through September 1972.

Respondents do not believe that a waiver of the notice and filing requirement is necessary under the circumstances of this proceeding and the related Louisiana breach of contract and damage case. Section 4(d) of the Natural Gas Act, which establishes the requirement in question, simply has no applicability to an award of compensatory damages by a court for the breach and violation of contractual obligations, especially when the obligor-wrongdoer has by its *own* continued breach of contract and misconduct prevented the injured parties from timely complying with the prospective filing requirements. *See, e.g., Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976), in which the court held that a party's legal obligation to respond in damages for private contractual breaches is an entirely "separate and independent" issue from the question of claims arising under requirements of the Natural Gas Act. It follows, therefore, that an award of compensatory damages for breach of contractual duties cannot properly be abrogated by the wrongdoer's obstruction, frustration, and prevention of timely compliance with notice and filing requirements under the National Gas Act. Such an interpretation of the Act would arbitrarily nullify legitimate contractual rights and effectuate gross injustices without serving any purpose of the Act. *See also: Gulf Oil Corp.* v. *American Louisiana Pipeline Co.,* 282 F.2d 401 (6th Cir.

1960); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972); and *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961).

Nevertheless, while respondents maintain their position that a waiver of the requirements of section 4 is not required because of Arkla's *own* continued breach of contract and wrongdoing for fourteen years, respondents hereby submit a request for such a waiver pursuant to section 154.98 of the Commission's rules in the event that the Commission believes that such a waiver is required under the circumstances of this proceeding.

In filing for this waiver, respondents do not intend that the final and definitive Judgment of the Louisiana Supreme Court dated March 5, 1979, as it specifically relates to the contractual issue of whether the favored nations clause in question was breached and triggered, should be reviewed by the Commission. After the Commission deferred the breach of contract and damage dispute to the Louisiana courts, respondents undertook a protracted and expensive trial which has resulted in a final and definitive judgment from the Louisiana courts determining that such triggering occurred and that the contract had been breached and violated by Arkla for fourteen years. Since this contractual issue has been fully litigated and Arkla has been afforded complete opportunity to argue its interpretation of the contract, this matter is foreclosed under the doctrines of res judicata and collateral estoppel from relitigation at the Commission.

In filing this request for a waiver, respondents also maintain their position that the failure to file prospectively changes in respondents' rate schedules with the Commission is not a defense that Arkla as the wrongdoer is entitled to assert, either in the courts or before the Commission. The Louisiana Supreme Court properly ruled that Arkla

was, under long recognized principles of contract law, estopped to assert such a defense since its own breach of contract and wrongful conduct made it impossible for respondents to file timely changes in rates as they were entitled to do under their contract with Arkla. Thus, the Commission should not purport to exercise any jurisdiction over the contractual and damage dispute between Arkla and respondents based on the absence of timely filings (or on any other ground).

Apart from adjudicating the contract dispute issue, however, as respondents have previously acknowledged in pleadings in this docket, the Commission is certainly entitled to ascertain whether there might be a violation of the Natural Gas Act occasioned by the award of compensatory damages by the Louisiana courts. This is an issue between the Government and respondents, and would be a matter in which Arkla has no legal interest. As set forth in this submission and previously, respondents have shown that the award of compensatory damages under the circumstances of this case does not constitute a violation of the Natural Gas Act or any of the purposes for which it was enacted by Congress, even if the prospective notice and filing requirements of section 4 are unsatisfied due to Arkla's continued breach of contract and effective concealment of the true facts from respondents for fourteen years. In the event that the Commission believes otherwise, however, respondents seek by this application a waiver of these requirements.

II.

In determining whether to grant a waiver under the circumstances of this case and section 154.98 of the Commission's rules, we respectfully submit that the Commission should consider whether the public interest would be served or disserved by denying such a waiver under the circumstances of this case. As we will now demonstrate,

respondents' contractually authorized price increases for their dry or residue natural gas would have been routinely approved had the notice filings been made in a timely fashion. The only reason such filings were not timely made is because Arkla wrongfully prevented them from being made. No public interest would be served by enforcing the prospective notice and filing requirement at this time under the circumstances of this case. Instead, the only beneficiary would be Arkla, the very party that wrongfully interfered with and made impossible respondents' timely compliance with the Commission's filing regulations, a result plainly contrary to the public interest and basic justice. Accordingly, a waiver is entirely appropriate here. The following considerations amply confirm this:

1. Over eighteen years ago the Commission determined that favored nations clauses contained in natural gas sales contracts entered into prior to April 3, 1961, are consistent with the public interest and thus are valid and enforceable as a matter of contract law up to the Commission's maximum area rate ceilings. The contract between Arkla and respondents was perfected on January 11, 1952. Hence, the price increases called for by the contract were and are permitted under Commission regulations. 18 C.F.R. § 154.93

2. The Louisiana Supreme Court has finally and definitively determined, in a judgment dated March 5, 1979, that respondents were from September 1961 through September 1972 (the period of time prior to respondents being classified as "small producers" under the Commission's regulations) contractually entitled to receive for their dry or residue natural gas as sold to Arkla the same prices that Arkla paid to the United States Government for dry or residue royalty gas produced from the same Sligo Gas Field, Bossier Parish, Louisiana, and delivered into Arkla's same Sligo pipeline system. A copy of Arkla's November 15, 1962 letter contract with the United States

Government setting forth the specific prices which Arkla agreed to pay and did in fact pay for the Government's residue royalty gas is attached as Exhibit A. In light of the Louisiana Supreme Court's judgment, respondents were, under their sales contract with Arkla, contractually entitled to receive the following prices for their dry or residue natural gas:

Sept. 1961 through Dec. 1961	Jan. 1962 through Dec. 1966	From Jan. 1, 1967
\$0.117432 per Mcf	\$0.130252 per Mcf	\$0.140508 per Mcf

3. Maximum area rate ceilings applicable to the residue natural gas in question have been established by the Commission and cover the entire period in issue, 1961-1975. *See* "Statement of General Policy 61-1." 24 F.P.C. 818; Other Southwest Area Rate Order Nos. 607 and 607-A, 18 C.F.R. §§ 154.109 and 154.109a. In the proceedings that led to establishment of these rate ceilings, the Commission fully considered all factors affecting the public interest and set the maximum just and reasonable rates that could be charged. The appropriateness of these determinations is not at issue.

The maximum area rate ceiling established by the Commission in 1961 was \$0.14 per Mcf at 15.025 p.s.i.a. (24 F.P.C. 818). This rate was superseded by the Other Southwest Area Rate Orders, which established the following maximum area rates for the sale of dry or residue natural gas in interstate commerce as produced from North Louisiana:

Prior to January 1, 1965	From Jan. 1, 1965 thru Sept. 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Had respondents been aware of Arkla's contractual agreements and activities with respect to its purchases of dry or residue gas, liquid hydrocarbons, natural gasoline, and extracted plant products from the Government and thus had the opportunity to file new rate schedules in a timely manner, these are the ceiling rates that would have governed the prices respondents were entitled to receive for their dry or residue natural gas. In a prior order in this proceeding (dated November 8, 1976), the Commission itself indicated that respondents could have collected rates for their natural gas up to these ceiling levels if they were contractually authorized and if proper filing procedures were followed:

> Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its "Other Southwest Area Rate" Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From January 1, 1965 Thru September 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

> Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

These ceiling rates are substantially *higher* than the prices that Arkla paid to the Government for its dry or residue natural gas pursuant to its November 15, 1962

letter contract and hence that respondents were entitled to receive under the favored nations clause contained in their 1952 gas sales contract with Arkla. Thus, it is beyond question that respondents would have received the prices due them under their contract with Arkla if they had been able to timely comply with the Commission's filing requirements.

4. Respondents' inability to file for the increased prices owed them under the favored nations clause was due wholly to Arkla's continued breach of contract and misconduct for fourteen years. As explained by the Louisiana Supreme Court in its March 5, 1979 decision:

> To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. *However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller.* Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, *it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission)* by failing to inform plaintiffs of its contractual arrangements with the United States Government. (Emphasis added.)

In its decision, the Louisiana court of appeal expressly labeled Arkla's breach of contract and conduct in this regard as "evasive," "uncooperative," and "not commendable."

Thus, due to Arkla's continued breach of its contractual responsibilities and its wrongful withholding and concealment of the true facts from respondents for fourteen years, it was simply impossible for respondents to comply with the prospective filing requirements of section 4(d) of the Natural Gas Act from September 1961 through September 1972.

5. Refusal to permit a waiver of the requirement of section 4(d), if that requirement is applicable under the circumstances here, would be plainly unjust. Section 4(d) clearly contemplates situations where the seller of the gas knows or has available the facts necessary to complete a filing and does not address the situation presented here, where Arkla as the contractual-obligor and purchaser effectively withheld the relevant facts for fourteen years and thereby wrongfully prevented respondents from making the filings. The filing requirement exists to allow the Commission to exercise its review function. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342 (1965). Where maximum area rates already exist, however, enforcement of the filed rate doctrine does *not* serve that function and, in this case, would unjustly benefit Arkla, the party that wrongfully prevented the filings. The filing requirements of the Natural Gas Act were clearly predicated on the assumption that pipeline purchasers, such as Arkla, would timely cooperate with sellers when necessary and were never intended as a device for evading and avoiding legitimate contract obligations. *Cf. Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla.), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co.* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American Louisiana Pipe Line Co.*, 282 F.2d 401 (6th Cir. 1960); and *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961).

In *Plaquemines Oil & Gas Co.* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971), the court considered the situation in which a natural gas company did not make the required filings with the Commission between 1961, when the Commission first asserted jurisdiction over the type of transaction involved, and 1966, after the Supreme Court upheld the Commission's assertion of jurisdiction. Under the literal terms of the Natural Gas Act, the company's operations during that period were unlawful and thus no rates were collectible. The Court noted, however, that under such a

theory "*the effects of such a ruling would be ruinous to Plaquemines' services—a wholly unreasonable and unpalatable result.*" 450 F.2d at 1139 n.15. The Court went on to state that "*this approach smacks of the vindication of statutory duties rather than the reasoned retroactive application of a statute. . . .*" (Emphasis added.)

In short, even though the company in *Plaquemines* had deliberately not complied with Commission filing requirements because of the litigation, the Commission engaged in retroactive analysis, and the court clearly indicated that it would have been unreasonable not to have done so. It follows a fortiori that in the present case where the filing requirements could not be complied with because Arkla as the purchaser under a gas sales contract violated the terms of the contract and withheld the true facts for fourteen years, any conclusion that Arkla's wrongdoing should be ignored and that the Natural Gas Act should be read with absolute literalness to prevent the award of compensatory damages in this case would be improper and unjust.

6. The Louisiana Supreme Court determined that Arkla would not be permitted to raise as a defense to respondents' action for damages for breach of contract respondents' failure to prospectively comply with Commission filing requirements because Arkla had made that compliance impossible. The same rationale should be adopted by the Commission in support of a waiver of any applicable filing requirements since it is a well-established principle. *See, e.g., United States* v. *Peck,* 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance . . . It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

Numerous other examples of the application of this principle can be cited, including the following:

(a) *R.H. Stearns Co.* v. *United States,* 291 U.S. 54 (1934):

"The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified." ' *Dolan* v. *Rodgers,* 149 N.Y. 489, 491; 44 N.E. 167; and *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447, 457; 127 N.E. 263; quoting *West* v. *Blakeway,* 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

(b) *Dietrick* v. *Greaney,* 309 U.S. 190 (1940):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L ed 876, 882, 45 S Ct. 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648, 71 L ed 1270, 1278, 47 S Ct. 714."

(c) *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975):

"And where a legal injury is of an economic character,

'[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867).' "

(d) *Story Parchment Co.* v. *Paterson P. Paper Co.,* 282 U.S. 555 (1931):

"As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . . .

'. . . And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.' "

(e) *Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975):

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.

In reflecting upon this jural proposition, a federal court has observed that 'Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.' The illustrations of this principle are legion. 5 Williston on Contracts §677, pp. 224-225, quoting Gulf Oil Corp. v. American Louisiana Pipe Line Co., 6 Cir., 1969, 282 F.2d 401."

(f) *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973):

"Deeply rooted in our jurisprudence is the rule applied by the District Court herein as enunciated in Coastal Oil Co. v. Eastern Tankers Seaways Corp., 29 N.J. Super. 565, 103 A.2d 26 (1954) as follows:

> 'It is well established as a principle of fundamental justice that if a promisor prevents or hinders the occurrence or fulfillment of a condition in a contract, and the condition could have been fulfilled except for such hindrance or prevention on the part of the promisor, then the performance of the condition is excused and the liability of the promisor is fixed regardless of failure to fulfill the condition.' 103 A.2d 32.

See also United States v. Peck, 102 U.S. 64, 26 L. Ed. 45 (1880); Gulf Oil Corporation v. *American Louisiana Pipe Line Co., 282 F.2d 401 (6th Cir. 1960); Tradewell Foods* v. New York Credit Men's adj. Bur., 179 F.2d 567 (2nd Cir. 1950); Restatement of Contracts §§294, 295 (1932); 5 S. Williston, Contracts §677 (3rd ed. 1961); 17A C.J.S. Contracts §468b (1963)."*

7. It is well established that common law claims based on natural gas sales contracts retain their character and continue to exist under the Natural Gas Act. *See, e.g., Pan American Petroleum Corp.* v. *Superior Court of Delaware,* 366 U.S. 656 (1961); *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.,* 282 F.2d 401 (6th Cir. 1960); *Western Natural*

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* *See also, e.g.,* Ohasi v. Verit Industries, 536 F.2d 849 (9th Cir. 1976); Keener v. Sizzler Family Steak Houses, 424 F. Supp. 482 (N.D. Tex. 1977); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d (6th Cir. 1965); Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966); Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967); Calon Petroleum Co. v. Big Chief Drilling Co., 548 F.2d 1174 (5th Cir. 1977); Concrete Specialties v. H. C. Smith Construction Co., 423 F.2d 670 (10th Cir. 1970); Kentucky Skilled Craft Guild v. General Electric Co., 431 F.2d 62 (6th Cir. 1970); C. H. Codding & Sons v. Armour and Co., 404 F.2d 1 (10th Cir. 1965); Ace Construction Co. v. W. H. Nichols & Co., Inc., 353 F.2d 110 (10th Cir. 1965); Ryder Truck Rental, Inc. v. Central Packing Co., 341 F. Supp. 872 (S.D.N.Y. 1977); Waters v. Key Colony East, Inc., 345 So.2d 367 (Fla. 1977); Transnational Insurance Co. v. Roselund, 261 F. Supp. 12 (D. Or. 1966); Galfand v. Chestnutt, 402 F. Supp. 1318 (S.D.N.Y. 1975); Glassman Const. Co., Inc. v. Maryland City Plaza, Inc. v. Milk Drivers & Dairy Emp. U. Local 584, 222 F. Supp. 125 (1963); Casale v. Carrigan and Boland, Inc., 288 So.2d 299 (La. App. 1974); Groghan v. Billingsley, 313 So.2d 255 (La. App. 1975); Briggs v. Siggio, 285 So.2d 324 (La. App. 1976); Chartres Corp. v. Charles Carter & Co., Inc., 346 So.2d 796 (La. App. 1977); Watson Bros. Transportation Co. v. Jaffa, 143 F.2d 340 (8th Cir. 1944); Gridiron Steel Co. v. Jones & Laughlin Steel Corp., 361 F.2d 791 (6th Cir. 1966); Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F.2d 242 (8th Cir. 1969); Christenson v. Felton, 322 F.2d 323 (9th Cir. 1963); and George W. Garig Transfer v. Harris, 75 So.2d 27 (La. S. Ct. 1954).

Gas Co. v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed and cert. denied*, 409 U.S. 1052 (1972). Accordingly, it is entirely appropriate that the Commission in implementing the Act should recognize traditional common law principles to avoid defeating those claims. Here, common law principles dictate that Arkla should be regarded as having received the notice that section 4(d) of the Act requires.

8. Under the well-established principles of law, equity, and justice as consistently applied and enforced by the courts in the cases just cited, it is clear that any claim of detriment to Arkla as the wrongdoer in this case through the grant of a waiver is *not* a factor for consideration. And since the public interest against excessive prices for residue natural gas as sold in interstate commerce has been fully protected by the maximum area rate ceilings, there is no just basis for the literal application of any filing requirement or denial of any necessary waiver. A waiver should in the interest of justice be granted.

WHEREFORE, if the Commission believes that a waiver of the notice and filing requirements of section 4(d) of the Natural Gas Act is necessary under the circumstances of this case, such a waiver should be granted.

Respectfully submitted,

/s/ Terry Coleman
JEROME ACKERMAN
TERRY COLEMAN

Covington & Burling
888 16th Street, N. W.
Washington, D. C. 20006

/s/ James Fleet Howell
JAMES FLEET HOWELL

Wiener, Weiss, Madison & Howell
411 CNB Building
Shreveport, Louisiana 71101

ATTORNEYS FOR RESPONDENTS

May 24, 1979

EXHIBIT A

ARKANSAS LOUISIANA GAS COMPANY

SHREVEPORT, LOUISIANA

November 15, 1962.

Mr. J. R. Reeve, Regional Oil and Gas Supervisor,
United States Geological Survey,
521 Wright Building,
115 West 3rd Street,
Tulsa 3, Oklahoma.

In re: Oil aand Gas Lease BLM-A-054491,
Sligo Field, Louisiana, Parcel No. 3

Dear Sir:

This refers to your letter to Natural Gas and Oil Company of October 12, 1962 and conference between the undersigned and you in your office in Tulsa on October 19th.

By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of \$0.117432 per mcf until January 1, 1962; \$0.130252 until January 1, 1967 and thereafter \$0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for Arkansas Louisiana Gas Company's share of the gas at the above figures.

Very truly yours,

/s/ J. C. Templeton
J. C. TEMPLETON,
Vice President.

cc: Murphy Corporation
Union Producing Company
Texas Gas Exploration Corporation
Natural Gas and Oil Comapny

VERIFICATION

STATE OF LOUISIANA
PARISH OF CADDO

James Fleet Howell, a member of the Law Firm of Wiener, Weiss, Madison & Howell, Shreveport, Louisiana, being duly sworn, deposes and says that he represents Frank J. Hall, et al, the Respondents herein, and that he is authorized on behalf of Respondents to execute and file the foregoing pleading with the Federal Energy Regulatory Commission and that he has read said pleading, is familiar with the contents thereof, and that all of the statements of fact therein set forth are true and correct, to the best of his knowledge, information, and belief.

/s/ James Fleet Howell
JAMES FLEET HOWELL

SUBSCRIBED AND SWORN TO before me, Notary, this 17th day of May, 1979.

/s/ Johnny Smith Duw
NOTARY PUBLIC in and for Caddo Parish, La.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 24th day of May, 1979.

/s/ Terry Coleman
TERRY COLEMAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Of Counsel

August 10, 1979.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

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RESTATEMENT OF THE CASE.

Respondents' argument opposing the granting of certiorari in this case depends upon assumptions of fact which not only are not borne out by the decisions in the suit in the Louisiana courts, but in important particulars misstates the facts upon which the Louisiana courts based their judgments. We therefore restate the case, and the Louisiana courts' decisions, to the extent necessary to point out the errors of Respondents' argument.

Respondents' Assertions That Petitioner Bought the Government's Gas.

Respondents or their predecessors entered into a gas sales agreement with Petitioner in 1952 which contained a "favored nation" provision which was to be activated "if . . . buyer should purchase from another party seller gas produced from the subject wells, or any other well or wells located in the Sligo Gas Field, at a higher price . . . ."[1] The favored nation section of the contract went on to provide for giving consideration, in the comparison of prices, not only to the actual price stipulated for gas bought from another seller, but to other pertinent provisions of the contracts being compared, to determine whether the total price paid was actually comparable.

In 1961 Petitioner began producing gas from wells in the Sligo Field under a lease from the federal government which stipulated a 1/6 royalty, granting the government the option to take the gas either in kind or to take a money royalty to be calculated at a value which the government retained the right to fix. The official of the Department of the Interior responsible for the administration of the lease contract fixed a value per Mcf for the calculated amount of the residue gas from the wells on the government land and required Petitioner to pay 1/6 of that amount plus 1/6 of the total value of the hydrocarbon liquids extracted from the well stream delivered to Petitioner's nearby extraction plant, with an arbitrary allowance for the shrinkage of the gas due to removal of the liquefiable hydrocarbons contained in the well stream; no allowance was

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[1] Section 8(D) of the gas sales contract, which is Respondents' Rate Schedule, is quoted beginning at the bottom of page 5 of the petition in No. 78-986.

made for the cost of operating the plant and extracting the liquids. Petitioner was also required by the government to process the raw condensate (oil) recovered at the well, which was carried to the plant in the pipelines carrying gas, again without any allowance for the cost of upgrading the condensate into salable products.

In 1961 one of Petitioner's officials raised the question whether the payment of royalty under the government lease amounted to the purchase of gas from another party seller, and the question, at the time it arose, was submitted to Petitioner's lawyers who gave a written opinion (contained in the Record) that the transaction did not involve a purchase of gas, and hence did not trigger Respondents' favored nation clause.

Respondents brought this suit in a Louisiana court of original jurisdiction in 1974, claiming that the payment of royalty to the federal government was a purchase from another party seller, triggering the favored nation clause, and sought a judgment for the difference in the payments received under the contract and the price alleged to have been paid to the federal government for gas. After Petitioner raised the defense that Respondents were claiming a price higher than the rate contained in their Rate Schedule (1952 contract) filed with the Federal Power Commission under the Natural Gas Act, Respondents amended their pleading to claim, as they said, damages for the breach of the contract based in part on the allegation that Petitioner had fraudulently and willfully concealed the facts from them.

The trial court made no finding on Respondents' allegations of fraudulent concealment (thus, under Louisiana law, denying them); held that under Louisiana law and the wording of the federal lease, the

royalty settlement was indeed a purchase of gas; granted Respondents recovery for gas sold by them beginning October 1, 1972, when they allegedly attained the status of "small producers" under Federal Power Commission regulations, and thus were excused from part of the filing requirements of the Natural Gas Act; and denied their recovery for the period 1961 to October, 1972, on the ground, under Section 4 of the Natural Gas Act and a Louisiana decision enforcing it,[2] that they could not recover for the rate increase which they did not file in the Power Commission. The Louisiana district court's opinion is in the Appendix to No. 78-986, at pages 24a-33a.

The Louisiana Court of Appeal reversed the district judge's ruling that a purchase of gas resulted from the royalty settlement, but affirmed the judgment in Respondents' favor on an interpretation hereinafter described, saying (No. 78-986, pp. 8a-9a),

> "... Defendant contends the payments were royalty or rent being paid in its position of lessee and not a purchase because the United States had no title to any gas produced under the lease, it having continuously elected to accept a value royalty on the gas produced."
>
> "We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. [Citing Louisiana cases and one federal case.]"

The Louisiana Supreme Court denied Petitioner's application for a writ of certiorari (No. 78-986 App.

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[2] *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corp.*, 220 La. 43, 55 So.2d 775 (1951), not cited in the opinion of the Supreme Court of Louisiana.

D, p. 22a) and granted Respondents' application for review (No. 78-986 App. E, p. 23a) of the judgment rejecting their claims for the period 1961-1972. Thus under Louisiana law, the Court of Appeal's judgment (under review here in No. 78-986) became the law of the case, as the Louisiana Supreme Court pointed out in footnote 4 to its opinion (No. 78-1789, App. A, p. 89a) as follows:

> "362 So.2d 1120 (La. 1978). It is well settled that, when both parties apply for a writ of review, this court's denial of the application made by one of the parties constitutes our final determination upon the matters included therein. This court then will not pass a second time upon these matters at the hearing on review granted through the application of the other party. Jordan v. Travelers Insurance Company, 257 La. 995, 245 So.2d 151 (1971). Hence, any questions relating to the determinations made by the courts below that defendant breached the favored nations clause of its gas purchase contract with plaintiffs are not now before us."

Respondents' argument against the granting of certiorari in this case depends in substantial part upon their continual repetition of the statement that Petitioner purchased the government's gas at a higher price (their brief pp. 6, 7, 8, 15, 16, 19); and this in spite of the fact that the question is absolutely settled in this case that there was no purchase of gas involved in the royalty settlement. The Court of Appeal's judgment in Respondents' favor was based on a very broad interpretation of the phrase "purchase from another party seller" (No. 78-986 App. B, pp. 9a, 10a):

> "We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the

term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

. . . . .

"The basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract. [citing cases.] As it is intended for the protection of the seller, the clause should be broadly construed to effectively carry out this purpose. Therefore, to exclude the substantial amounts paid to the government by defendant as having any bearing on the price being paid for gas by defendant in this field because of a technical semantic classification of the payment as being rent royalty would render the protection intended to be afforded plaintiffs by a price adjustment clause meaningless."

Respondents' Claim of Fraudulent Concealment Was Rejected by the Louisiana Courts.

Respondents' argument also relies strongly on their unsupported allegation that Petitioner wrongfully concealed, and gave them false information concerning, the payments to the federal government. See their brief, pages 6, 7, 8, 10, 17, 27, 29, 30, 33, 34, 35-37, 47, 48, 52. This ground of their argument also has been specifically struck down by the judgment and opinions of the Louisiana courts. As we have already noted, the trial court made no finding on the allegation and thus overruled it. The Court of Appeal (its opinion, No. 78-986 App. B, p. 14a) said:

"The trial court did not make a finding that defendant was guilty of fraudulent concealment, and we find the evidence is insufficient to support such an allegation."

"The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiffs' contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. . . ."

The Supreme Court was even more positive in disclaiming any intention to base its holding that Petitioner had "prevented the fulfillment of the condition" (of filing with the Power Commission) on the allegations of bad faith and fraud. In its opinion, footnote 6 (No. 78-1789 App. A, p. 93a), it said:

"We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La. St. L. Inst. transl. 1959)."

and then later in its opinion the court was more specific (No. 78-1789 App. A, p. 97a):

"The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the

evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct. Plaintiffs failed to prove that defendant possessed the requisite intent to defraud."

The Rate Schedule Contains No Provision for a Severable Payment for Liquid Hydrocarbons.

In spite of the positive statements to the contrary in Respondents' opposition to grant of certiorari, there is no provision in the Rate Schedule which would permit the grant of a judgment for residue gas, a separately calculated amount for extracted liquid hydrocarbons, and an increment in the price of the condensate produced by Respondents' wells.

The judgment which the Supreme Court of Louisiana directed to be entered (No. 78-1789 App. A, p. 94a), and which has indeed since the Supreme Court's decision been entered by the district court (No. 78-1789 App. C, p. 101a), is in an amount which is materially greater than the amount that would result from pricing the gas sold by Respondents to Petitioner at the wellhead price provided by the Area Rate Ceiling order as contained in the Federal Power Commission's Opinion No. 607. This results from altering the Rate Schedule, which Respondents have done in their calculations in the guise of applying the so-called pertinent provisions of the comparability portion of the favored nation clause. Respondents' claims and calculations ignore the provision quoted below which provides for a wellhead price for the gas and the entrained liquids. Respondents claim a price for the "residue gas" and a separate price (claimed to be the amount paid to the government) for the extracted liquid hydrocarbons. This

necessarily assumes a change in Respondents' Rate Schedule, in violation of Section 4(d) of the Natural Gas Act which provides that "[U]nless the Commission otherwise orders, no change shall be made by any natural gas company in any . . . contract . . . except after 30 days notice . . . ."

Respondents state repeatedly in their brief that the Louisiana courts have held that the contract contains provisions for severable prices for the residue gas and the liquids; see their brief pages 17, 22-23, 24, 26, 27, 37-39. This statement is not so. In the district court the only reference to the whole problem was the statement in its opinion (No. 78-986 App. F, p. 36a) that

> "The evidence demonstrates that the prices paid to the United States per MCF of gas was below the maximum area rate established in these orders, which means that the area rate schedule would not actually impose any limit under the facts of this case after October, 1972, but would prevent recovery before that date."

In the context this means that the only comparison in the district judge's mind was between the price established by the Rate Schedule and the contemporaneous royalty settlement for residue gas. In the Court of Appeal there is no reference whatever to the problem. The court merely stated (No. 78-986, p. 17a) that the contract "requires the interpretation that all pertinent factors necessary to properly equate the price of gas shall be given consideration and those specified are illustrative only." The Supreme Court made an even more casual reference to the problem (No. 78-1789, p. 94a) when it was stated in a footnote to its opinion that

> "We note that plaintiffs make no claim that they would have been entitled to a price increase under

their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

The 1952 gas sales contract, Respondents' Rate Schedule in question here, contains the following provision:

> "(B) The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquefiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products, it being further understood and agreed, however, that nothing herein is intended to deprive Seller of the right to operate a standard type oil field separator at each well subject hereto in order to remove such condensate as may be thereby extracted prior to delivery of production hereunder to Buyer. The parties take cognizance of the fact that the aforesaid prices hereinabove provided to be paid are $0.0025 per MCF higher than would have been provided had Seller retained the right to participate in the recovery of products by such processing operations subsequent to delivery, and accordingly the aforesaid prices have been calculated and agreed to by the parties with the intention and understanding that payment of the said prices shall constitute payment for all products whatsoever recoverable from the production delivered to Buyer hereunder."

There is absolutely nothing in the above provision, or in any other part of the contract, which would lead to the result that a separate sale of residue gas and of

extracted hydrocarbons contained in the gas was intended. Not one of the Louisiana courts has either understood or addressed the problem and the incautious statement contained in the order of the Federal Energy Regulatory Commission quoted in Respondents' brief is based simply, it appears, on the Respondents' assurance that the question has been decided by the Louisiana courts.

Even if it is correct, as Respondents' argument assumes, that the contract provides for a regulated price for residue gas and an unregulated price for extracted liquids, that fact would not justify the judgment which Respondents seek and which the district court has now rendered. Petitioner produced three hydrocarbon products under its grant of the lease on the government land: residue gas, extracted liquids, and raw condensate; it owed the government a royalty of 1/6 on each product. If Respondents' rate schedule is to be considered as a separate purchase at a separable price of each of the products, then logic would demand that the favored nation provision, having to do only with the purchase of gas, would have no effect on the contract price owed by Petitioner to Respondents for extracted liquids and condensate. Respondents' Rate Schedule provided for wellhead delivery of gas containing extractable liquids, and that price is subject to the area ceiling rates. If, as Respondents argue, the extractable hydrocarbons are sold separately, they are not covered by the favored nation provision.

In our argument we will comment further on these questions.

There Is No Holding of Estoppel in the Louisiana Supreme Court's Opinion.

Respondents have based their argument in part on repeated assertions that the Louisiana Supreme Court has held that Petitioner is estopped to rely in this case on the provisions of Section 4 of the Natural Gas Act; see their brief, pages 30, 32, 36, 52. The opinion of the Supreme Court contains not one word on which these allegations can be based.

Respondents' Argument Assumes, As Did the Supreme Court of Louisiana, That if Respondents Had Filed With the FPC for Rate Changes, the Commission Would Have Permitted the Changes to Become Effective and Would Have Authorized Prices Limited Only by the Area Rate Ceilings Established by Opinions Nos. 607 and 607A.

Respondents' argument and the Louisiana Supreme Court's holding in giving effect, beginning in 1961, to the area rate ceilings established in Opinions Nos. 607 and 607A at 20.6¢ for wellhead deliveries in northern Louisiana completely overlook the fact that the FPC Area Rate orders were issued in October and November, 1971.

If Respondents had filed rate changes, the changes would have been filed in 1961, or at the latest in 1962, when payments of royalty at values higher than Respondents' prices were initiated. At that time and until 1971 there were no rate ceilings, but the Power Commission in passing on initial prices of duly filed contracts and changes proposed under the provisions of old contracts, relied on its Statement of General Policy 61-1, 24 FPC 818 (1960); it permitted, where contractually authorized, increased prices in north Louisiana up to 13.7¢ per Mcf. The Supreme Court of Louisi-

ana made two assumptions as to what the FPC would have done if Respondents had filed for the increased rates:

(1) it assumed that in 1961 the FPC would permit the change to become effective by construing Respondents' Rate Schedule, providing for increases in case the buyer "purchased from another party seller at a higher price" to include royalty settlements, and

(2) that it would have permitted the prices limited by the Area Rates approved by Opinion No. 607 issued ten years later.

Neither of these assumptions is either probable or legally permissible.

In this reply we propose to discuss the following:

(1) The Louisiana Supreme Court's error in failing to follow the "Filed Rate Doctrine" and the error of Respondents' argument attempting to support that decision.

(2) The Louisiana courts' lack of jurisdiction over the questions they have decided,

  (a) interpretation of the gas sales contract as to the triggering of the favored nation provision, and

  (b) the determination of specific rates for the sales of gas.

(3) Alternatively to (b), the errors made by the Louisiana courts in their decisions on the federal questions described in (b) on which they passed.

The petition for certiorari in No. 78-1789 seeks review of the issue listed as (1) above, and the other two issues are covered by No. 78-1789 and also by No. 78-986.

THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA IS IN VIOLATION OF THE FILED RATE DOCTRINE.

The Supreme Court of Louisiana in its opinion (Appendix, Petition for Certiorari, No. 78-1789, pp. 83a, et seq., 92a, 93a) accepted as the law of the case the decision of the Louisiana Court of Appeal that the favored nation price increase was activated by the royalty payment to the federal government; and held that Petitioner, by failing to notify Respondents of the increase, even though it was free of bad faith and fraud, excused Respondents from the condition requiring them to file for the rate increase with the Federal Power Commission. The court reached its conclusion by applying article 2040 of the Louisiana Civil Code, excusing compliance with a contractual condition where the compliance was prevented by an act of the other party to the contract; even though it failed to notice that the condition was not one imposed by the contract, but rather was a requirement of federal law.

Respondents' argument attempting to support this holding is contained in pages 35 to 54 of their brief in opposition; the introductory summary of their argument on pages 35 to 37 relies upon (1) "well established rules and fundamental principles of law, equity and justice," (2) an assertion that Petitioner is *estopped* from relying on its own wrongdoing and concealment of the facts, and (3) that failure to sustain the judgment would lead to unjust enrichment of Petitioner at Respondents' expense.

As we have pointed out in our restatement above, the opinions of the Louisiana courts contradict the Respondents' assertions of concealment and estoppel. As to Petitioner's supposed unjust enrichment, Respondents have referred to no fact which would alter the prevailing rule applicable to utilities, such as Petitioner, that permits, even requires, them to recover their expenses, including purchased gas, in the rates charged to their customers. Respondents' argument also overlooks the fact that the "relevant public interest" in the price of gas sold by interstate gas sellers is not to be found in Respondents' assertions, nor in the decisions of the courts of the State of Louisiana, but rather by the Federal Energy Regulatory Commission in accordance with the Natural Gas Act.

Respondents' argument (brief pp. 37, et seq.) also assumes, contrary to the fact, that the recovery directed by the Supreme Court of Louisiana, as now contained in the judgment rendered by the trial court (No. 78-1789 App. C, p. 101a) is within the Commission imposed limits. The judgment is for amounts for each of Respondents far exceeding those limits, a result attempted to be justified by Respondents on the ground that the Louisiana courts have held that the contract provides severable prices for "residue gas" and "extracted hydrocarbon liquids." The Louisiana courts obviously did not understand the problem, and nothing in the opinion of either the Court of Appeal or the Supreme Court of Louisiana indicates they intended to do what Respondents attribute to them; this brief, pages 9 to 11.

The Solicitor General has placed in an appendix to his brief the order of the Federal Energy Regulatory

Commission entered May 18, 1979, declining jurisdiction in this case, and Respondents' brief contains several quotations from that order even though the order is not final. In footnote 19, Appendix to Solicitor General's brief, page 14a, the Commission stated:

> "The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate."

We are not able to find any support for the finding attributed to the proceedings in the Louisiana courts.

Respondents' brief makes no attempt to rebut the application to this case of the filed rate doctrine, which is discussed in the petition for certiorari herein, pages 10 to 15. We also note that both the Federal Energy Regulatory Commission and the Solicitor General in his brief to this Court (filed in response to this Court's request in No. 78-986) agree that the Louisiana Supreme Court's judgment cannot stand, as being in conflict with the filed rate doctrine. In its order above referred to (Solicitor General's brief, App. p. 13a), the Commission said:

> "It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States

seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall,* Sup. Ct. No. 78-986, filed December 18, 1978."

In conclusion on this branch of the case, we quote the final paragraph of the Solicitor General's argument, brief pages 16-17:

"In our view, the Supreme Court of Louisiana erred in holding that respondents must be deemed to have applied for the necessary rate increases between 1961 and 1972, and that the Commission would have allowed the increases. Even assuming, for the sake of argument, that Arkla's conduct prevented respondents from filing for the rate increases because they were not informed of the lease payments to the United States, this does not override the supervening requirements of the Natural Gas Act's rate filing provisions. See *e.g., Northern Natural Gas Co.* v. *Kansas Corporation Commission* [372 U.S. 84 (1963)]. The *Montana-Dakota* case itself rested upon claims that filed rates claimed to be unreasonably low were a product of fraud. But this allegation did not avoid the filed rate doctrine. The Louisiana Supreme Court's erroneous decision, however, is not the subject of the present petition.[13]"

"[13] As we have noted, page 10, *supra,* Arkla has recently filed a petition for a writ of certiorari to review that decision. While we believe that the decision of the court of appeal, of which the instant petition seeks review, is correct with respect to the issues of the Commission's primary jurisdiction and the filed rate doctrine—and therefore does not warrant this Court's review—the Court may consider it appropriate to defer consideration of the instant petition until it considers the most recently filed petition and the responses thereto. Moreover, while our position here is based on the Commission's decision of May 18, 1979, it should

be noted that that decision is, under the Natural Gas Act, subject to reconsideration by the Commission, and to judicial review in the federal courts of appeals. See note 10, page 10, *supra.*"

THE LOUISIANA COURTS DO NOT HAVE JURISDICION OF THE QUESTIONS PRESENTED BY THIS LITIGATION.

Petitioner's application for certiorari to the judgment of the Louisiana Court of Appeal, No. 78-986, filed in this Court in December, 1978, specified as a ground for grant of certiorari Petitioner's claim that the Louisiana court did not have power to interpret authoritatively the favored nation provision of Respondents' Rate Schedule (Section 8(D) of the 1952 contract), nor to determine what the price or rate for the gas sold by Respondents should be. That same question of jurisdiction recurs in this case and is specified in the present petition, No. 78-1789. Those questions should have been referred by the Louisiana court to the Federal Power Commission.

Respondents' reply to this ground of the petition for certiorari (their brief pp. 11-15) is completely unfocused. This suit, insofar as this ground of alleged error is involved, is concerned entirely with (1) interpretation of a Federal Power Commission Rate Schedule and (2) determination of the price of interstate gas under the Rate Schedule, both questions at the very heart of the Commission's administration of the Natural Gas Act.

In response Respondents cite cases having to do with various collateral and incidental questions arising under natural gas sales contracts. "Jurisdiction" is a word of many shades of meaning: jurisdiction to determine whether a price was escalated by a contract provision,

and what the escalated price should be, is one thing; jurisdiction on removal from a state court (one of the decisions referred to by Respondents) is quite another, as are most of the decisions cited by Respondents.

"Petitioner's Reply to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae" filed in No. 78-986 on June 13, 1979, contains a specific and reasoned argument as to why the State was required to disclaim jurisdiction in this case.[8] We do not have anything to add to our argument there, and this argument has not been answered by Respondents; pages 4 to 28 of that brief.

THE STATE COURT DECISIONS INFRINGE ON THE COMMISSION'S REGULATORY RESPONSIBILITY UNDER THE NATURAL GAS ACT.

In the restatement contained in this brief (pages 1 to 14) we have pointed out the lack of support in the opinions of the Louisiana courts for Respondents' assertion in their brief that the lower courts decided that the Rate Schedule provided for severable payments for extracted liquid hydrocarbons and for residue gas. In their brief (page 25) Respondents say that the recovery supported by the evidence in the case is apportionable 45% to the extracted liquids and 55% to residue natural gas; that is, that approximately one-half of the judgment they have now obtained in the district court (No. 78-1789 App. C, p. 101a) is not for gas but for extracted liquids.

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[8] The Federal Energy Regulatory Commission's order is or will be before the Court of Appeals for the District of Columbia Circuit.

The lack of legal and factual support for Respondents' claims in this respect—without doubt a question arising under the Natural Gas Act and the regulations of the Commission—is fully discussed in our reply to the Solicitor General's brief, filed June 13, 1979, in No. 78-986, pages 28 to 31, and will not be repeated here.

We do call attention to the fact that Respondents' claim for the additional payment for extracted liquids is based upon the provision of the favored nation clause for comparison of all pertinent provisions of the Respondents' sales contract with the provisions of the subsequent contract by which Petitioner has allegedly bought gas at a higher price. The subsequent contract being compared is not a purchase contract but is an oil and gas lease, providing for royalties based upon the value of a fraction of the total production of oil, gas and extracted hydrocarbon liquids. The fact that Petitioner paid a separate royalty at a higher value on extracted liquids is irrelevant in evaluating the price it paid for dry gas. If indeed the Rate Schedule is severable as to the settlement for the two products, then the escalation provision as to gas would have no effect upon the provisions of the oil lease for royalty settlements on extracted liquids.

CONCLUSION.

The judgment of the Supreme Court of Louisiana which is applicable to that part of the gas sold under Respondents' Rate Schedule prior to the date they are alleged to have secured an exemption from filing as small producers, sought to be reviewed in No. 78-1789, should be summarily reversed; and the judgment of the Louisiana Court of Appeal should be reviewed by this Court on certiorari in No. 78-986.

Respectfully submitted,

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August 10, 1979.

No. 78-1789

In the Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation of October 1, 1979, on behalf of the United States and the Federal Energy Regulatory Commission.[1]

---

[1] Under Section 402(a)(1)(C), (D), (E), and (F) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, to be codified at 42 U.S.C. 7172(a)(1)(C), (D), (E), and (F), this agency has succeeded to the relevant functions and responsibilities of the former Federal Power Com-

QUESTION PRESENTED

Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the Supreme Court of Louisiana violated the filed rate doctrine as set forth in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), in holding that respondents are entitled to damages in excess of rates on file with the Commission prior to the time that respondents achieved small producer status.

STATUTE AND REGULATIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. 717c and regulations thereunder, 18 C.F.R. 154.92-154.95, 157.40, are set forth at 78-986 Pet. App. 48a-50a, 52a-60a.

STATEMENT

The facts of this case are more fully set forth in our response to a related petition, *Arkansas Louisiana Gas Co.* v. *Hall*, cert. denied, No. 78-986 (Oct. 1, 1979) (78-986 Amici Br. at 2-10). To briefly summarize, in 1952 respondents, producers of natural gas, entered into a contract to sell gas to petitioner Arkansas Louisiana Gas Company ("Arkla"). The contract set forth a schedule of fixed prices, including increases in specific amounts to be

mission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

effective every five years up to an agreed maximum. The contract also contained a further price escalation provision, known as a "favored nations clause," under which respondents were entitled to further price increases if Arkla purchased gas from another party from the same field at a higher price. After 1954, respondents obtained a certificate from the Commission to sell the gas under the contract, and filed the contract and each of the scheduled increases in the fixed price with the Commission.

In 1974 respondents sued Arkla in a Louisiana state court for breach of contract; they claimed that certain leases obtained by Arkla from the United States in 1961, and Arkla's lease payments thereunder, had triggered respondents' rights to higher prices under the favored nations clause.

Arkla denied the claims. It also moved the state court to dismiss the action on primary jurisdiction grounds and petitioned the Commission for a declaration that its lease payments had not triggered the favored nations clause. After several decisions and a remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission ultimately denied Arkla's petition on May 18, 1979 (App., *infra*, 1a-15a). The Commission held that under the circumstances of this case, it would decline to exercise primary jurisdiction in respect of what it viewed as essentially a dispute over contract issues that do not require the Commission's expertise or implicate policies under the Natural Gas Act (*id.* at 7a-13a). It concluded that those were matters that could

and should be resolved by the state courts, but it also expressed the view that it would be contrary to the Natural Gas Act and the filed rate doctrine for state courts to award respondents damages for the period prior to 1972, when respondents acquired small producer status and were thus relieved of an obligation to file their rates with the Commission (*id.* at 12a n.18). In other words, the Commission concluded that, prior to 1972, the amounts to which respondents were lawfully entitled were limited to the specific rates on file with the Commission and they could thus not be awarded any additional amount for that period based on an alleged breach of contract.

In the meantime, the state courts adjudicated respondents' contract action. The state trial court held that Arkla's payments to the United States after 1961 had triggered the favored nations clause, but it also held that under the filed rate doctrine, respondents could obtain damages only for the period after 1972. The Louisiana court of appeal affirmed both aspects of the trial court's holding. The Supreme Court of Louisiana denied Arkla's application for a writ to review the court of appeal's decision. Arkla then filed a petition in this Court for a writ of certiorari to review the decision of the Louisiana court of appeal. *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-986. In response to the Court's invitation, we filed a brief expressing our view that the court of appeal's decision was correct and that the petition should be

denied.[2] This court denied the petition on October 1, 1979.

After the decision of the court of appeal, the Supreme Court of Louisiana, although denying Arkla's petition for review, granted respondents' petition for review and reversed that part of the court of appeal's decision limiting respondents' recovery to the period after 1972. The Supreme Court of Louisiana concluded that Arkla had prevented respondents from making appropriate filings with the Commission before 1972 by not informing respondents of its lease payments; that the Commission would have approved respondents' filings for an increase; and that respondents should therefore be allowed to recover damages for the entire period between Septembr 1961 through December 31, 1975. The instant petition seeks this Court's review of that decision.

On May 24, 1979, respondents filed with the Commission an application for a waiver of the Commission's filing requirements, presumably on the assumption that if the Commission granted such a waiver, the filed rate doctrine would not bar their recovery of damages for the period prior to 1972. The Commission has not yet acted on that application.

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[2] We noted, however (Amici Br. at 10, 17, n.13), that Arkla had subsequently filed a petition for a writ of certiorari (*i.e.*, the instant petition) to review a later decision of the Supreme Court of Louisiana reversing, on respondents' petition, that part of the court of appeal's decision limiting their recovery of damages to the period after 1972; and we suggested that this Court might wish to defer consideration of the petition in No. 78-986 until it considered the instant petition.

DISCUSSION

As we stated in our Brief as Amici Curiae in No. 78-986 (at 15-17), we believe the Supreme Court of Louisiana erred in holding that respondents are entitled to damages from petitioners for the period from 1961 to 1972. This holding, we believe, is contrary to a basic and well established principle of rate regulation known as the filed rate doctrine, under which a person "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Public Service Co.*, 341 U.S. 246, 251 (1951). See also *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Farley Terminal Co.* v. *Atchison, T. & S.F. Ry.*, 522 F.2d 1095, 1098 (9th Cir., cert. denied, 423 U.S. 996 (1975)). This principle precludes an award of damages that would have the effect of giving respondents a higher price for their gas than the tariff on file with the Commission during the period that respondents were required to file tariffs with the Commission. The filed rate doctrine is based on the statutory objective of establishing a uniform system of rates within the exclusive control of the federal agency; indeed this court in *Montana-Dakota* applied the doctrine notwithstanding claims that the filed rates claimed to be unreasonably low were the product of fraud.

CONCLUSION

Because the filed rate doctrine is an important principle of federal rate regulation, we normally would urge the Court to grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana. However, if the Commission should grant the pending application for waiver of the filing requirement, the issue may well be moot. In the circumstances, the Court may wish to hold the petition to await the Commission's action.

Respectfully submitted.

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FEBRUARY 1980

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Primary Jurisdiction

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr., and George R. Hall.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK F. HALL, ET AL.

ORDER DECLINING JURISDICTION AFTER RECONSIDERATION OF THE ISSUE ON REMAND

(Issued May 18, 1979)

I

A QUESTION OF JURISDICTION

In this case this Commission [1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to de-

[1] These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transfered to the FERC. The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, to the FERC.

termine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation clause" in a gas supply contract between the utility and certain independent producers of gas?[2]

II

HISTORY OF PROCEEDINGS

A. *The Parties*

Frank J. Hall *et al.* are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractual provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for

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[2] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4-5.

gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. *The State Court Proceedings*

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court[3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement with the government had triggered the most favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana, Second Circuit,[4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the United States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party

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[3] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

[4] *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (May 1, 1978).

seller." [5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[6] Arkla has petitioned the Supreme Court of the United States for certiorari.

C. *Action Before the FPC*

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order

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[5] The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> . . . in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporation* v. *Federal Power Commission*, 149 U.S.App.D.C. 310, 453 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32 L.Ed.2d 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activiation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6] A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of considering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC [7] held:

> There is no question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * *
>
> However, there is a threshhold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court * * *. This case presents a question of concurrent jurisdiction * * * While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the Court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled [8] that even if the state court held that the Hall group was entitled to a higher rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the

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[7] *ArkansasLouisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issue June 4, 1976). In these proceedings, the FPC issued other orders which are not relevant at this time.

Commission's regulations. The FPC also noted that since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. *Actions By The FERC*

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[9] the Commission asked for briefs directed towards the question of

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

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[9] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]ommission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court." [10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum

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[10] Order Denying Petition (March 8, 1976), p. 3.

to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contract questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Silgo gas field at a higher price than is provided to be paid for gas delivered under this agreement." While there are circumstances where the interpretation of a favored nation clause may involve this Commission's technical expertise,[11] we have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from another party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination

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[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need for uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests," [13] and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that

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[12] See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343-344 (1956); *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 109-110, 112-114 (1958).

[13] *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

triggers an automatic price increase under the favored nation clause. In the circumstances of this case whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale", it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case.

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[14] The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n.2, p. 3.

[15] This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce for resale." Section 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717(b).

This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing." [16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group were entered into long before this Commission became actively concerned with the indefinite price escalator clauses and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nation clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

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[16] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

[17] 18 C.F.R. 154.93.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of

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[18] The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 C.F.R. 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored-nation clause. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small producer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, *up to applicable limits provided by the Commission* for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2, n. 1:

> Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana

great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana

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Court therefore deemed that the Hall group had fulfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

[19] On April 25, 1979, we issued an "Order Requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydro-

Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme Court of Louisiana further stated:

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carbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

[20] As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

[21] *Frank J. Hall* v. *Arkansas Louisiana Gas Company*, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Appli-*

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

By the Commission.

[SEAL] Kenneth F. Plumb,
Secretary.

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cation For Rehearing, (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976).

[22] Supreme Court of Louisiana, slip op. p. 12, n.7.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

In our initial response to the instant petition, filed pursuant to the Court's invitation of October 1, 1979, we informed the Court that the Commission had under consideration an application by the respondents for a waiver of the Commission's rate filing requirements. As the attached order shows (App., *infra*, 1a-15a), the Commission has voted to deny the application for a waiver. For the reasons stated in our initial brief, we believe that the filed rate doctrine (*Montana-Dakota Utilities Co.* v. *Public Service Co.*,

341 U.S. 246 (1951)) bars respondents from recovery of damages for the period from 1961 to 1972. Accordingly, we recommend that the Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana.

Respectfully submitted.

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Solicitor General

ROBERT R. NORDHAUS
General Counsel
Federal Energy Regulatory Commission

NOVEMBER 1980

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FILED RATE DOCTRINE
CONTRACT DAMAGES

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

ORDER DENYING APPLICATION FOR WAIVER OF FILING REQUIREMENTS

(Issued November 5, 1980)[1]

On May 24, 1979, Frank J. Hall, *et al.* (the Hall group) filed an application pursuant to Section 154.98 of the Commission's[2] Regulations requesting a waiver of the notice requirements contained in

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[1] This order has been modified to reflect an *errata* notice issued November 6, 1980, correcting an order posted on November 5, 1980.

[2] The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commision.

Section 4(d) of the Natural Gas Act.[3,4] In support of its request, the Hall group asserts that timely compliance with Section 4(d) was impossible because Arkansas Louisiana Gas Company (Arkla) wrongfully concealed from the Hall group the facts which would have made such compliance possible. The effect of granting the waiver would be to allow the Hall group to collect from Arkla for the period September 1961-October 1972, a rate for gas in the Sligo field higher than that on file with the Commission. For the reasons given below, we reaffirm our conclusion that the filed rate doctrine applies and deny the waiver.

PROCEDURAL HISTORY

A. *State Court Proceedings*

On July 18, 1974, the Hall group brought a breach of contract suit against Arkla in a Louisiana court.[5] The suit concerned the proper interpretation of a favored nations clause contained in a 1952 gas purchase contract between the Hall group and Arkla. It was the Hall group's contention that royalty payments made to the United States Government by Arkla since 1961 had triggered the clause.

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[3] In addition, the Hall group filed an additional petition seeking waiver on May 29, 1980. This petition requests no additional relief.

[4] The Hall group's request for waiver is presented in the alternative. The first request, and one that would moot the waiver question, is for a finding by the Commission that the award of damages in a contract action by the Louisiana courts does not involve this Commission's jurisdiction.

[5] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699.

The Louisiana State District Court rendered a verdict in favor of the Hall group. The court found that the favored nations clause had been triggered by the U.S. royalty payments and awarded damages to the Hall group for the period from October, 1972, through December, 1975. The court concluded that it could not award the Hall group damages for the period prior to October, 1972, because such an award would constitute a rate change, and the courts do not have authority to authorize rate changes. Damages for the 1972-1975 period were appropriate, according to the court, because the Hall group was a small producer during that time, and under the Commission's Regulations, small producers were not required to make rate change filings.[6]

On review, the Louisiana Second Circuit Court of Appeal affirmed.[7] The Louisiana Supreme Court subsequently modified the decision of the lower courts, holding that the Hall group was entitled to recover for the 1961-1972 period.[8]

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[6] These findings are consistent with the view of the Commission as expressed in orders issued both before and after the Louisiana District Court's opinion.

[7] The Court of Appeal also recited the fact that the trial court had not found fraud and stated that the record would not support a finding of fraud. *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (La.Ct.Ap. 1978).

[8] *Hall* v. *Arkansas-Louisiana Gas Company*, 368 So.2d 984 (La. 1979) *cert. denied*, Oct. 1, 1979, —— U.S. ——. Arkla's Petition on rehearing of the denial of certiorari to the decisions of the Louisiana Court of Appeal is now pending in the United States Supreme Court. *Arkansas Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978. In *Arkansas-Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-1789, filed May 29, 1979, Arkla sought certiorari of the Louisiana Supreme Court's order assessing liability for the

B. *Commission Proceedings*

On September 11, 1975, Arkla filed in this docket a petition for a declaratory order construing the favored nations clause. The Commission declined to resolve the contractual dispute, stating in its March 8, 1976, order that "[i]t has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court . . . ."[9] Arkla appealed this decision to the D.C. Court of Appeals,[10] and while the appeal was pending, the Commission moved for an order remanding the record for further consideration. The Commission's request was granted by the court on May 25, 1978.

On remand, the Commission, in an order issued May 18, 1979, adhered to its earlier determination to decline to exercise jurisdiction. It did so, however, for a reason different than that enunciated in the March 8, 1976, order. The Commission stated that it "believe[d] the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous."[11] Rather, the Commission stated, the decision to defer should turn on whether the Commission finds that the issue involves a matter of "primary jurisdiction." In making this determination, the Commission stated, it would look to the following three factors:

1961-1972 period. In Sup. Ct. No. 79-1896, Arkla has sought certiorari of the judgment entered by the Louisiana district court on the remand of the damages issue.

[9] *Mimeo*, at 3.

[10] *Arkansas Louisiana Gas Company* v. *FERC*, D.C. Cir. No. 77-1146.

[11] Order issued May 18, 1979, mimeo, at 6.

(1) whether the Commission possesses some special expertise which makes the case particularly appropriate for Commision decision;

(2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.[12]

After reviewing these three factors in the context of the instant case, the Commission concluded that the assertion of jurisdiction was unnecessary. In its discussion, however, the Commission expressed the view that the Louisiana Supreme Court's award of damages for the 1961-1972 period violated the filed rate doctrine.[13]

Thereafter, the Hall group filed its application for a waiver of the notice requirements prescribed in Section 4(d). Arkla submitted a response and protest to the application on June 8, 1979. The Hall group filed a reply to Arkla's response on June 13, 1979.

POSITIONS OF PARTIES

The Hall group filed its request conditionally, contending that a waiver of the filing requirements is not necessary since Section 4(d) has no applicability to a judicial award of damages for breach of contract. The Hall group then contends that if a waiver is required, principles of law and equity establish that a waiver is justified. The Hall group argues that the only reason that it failed to comply with the notice provisions of Section 4(d) was because Arkla

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[12] *Id.*

[13] *Id.* at 10, n. 18.

wrongfully concealed from the Hall group the royalty payments which Arkla was making to the United States.

Arkla asserts that the requirements of Section 4(d) apply to the court-awarded damages because such damages are merely the additional prices to be paid under the 1952 contract, as interpreted by the courts of Louisiana. Arkla further asserts that the filed rate doctrine absolutely precludes the Hall group from collecting any damages for the period prior to October, 1972. Arkla also denies any allegations of wrongdoing on its part, and argues that the Hall group is simply seeking a windfall at the expense of the consumer.

DISCUSSION

The Commission has before it two issues: (1) does Section 4(d) of the Natural Gas Act apply to the matter of damages awarded to the Hall group for the 1961-1972 period? and (2) if so, is there good cause to grant waiver of Section 4(d) in this case and, further, accept the rates filed by the Hall group. Both of these questions involve the scope of and reasons for the filed rate doctrine.

A. *Applicability of Section 4(d)*

We address first the contention of the Hall group that Section 4(d) is inapplicable here. Citing *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972) and *Cities Service Gas Company* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976), the Hall group argues that a court award of damages for breach of contract is an entirely "separate and independent" issue from the question of rate obliga-

tions imposed by Sections 4 and 5 of the Natural Gas Act.

Section 4(d) of the Natural Gas Act provides that a natural gas company shall not change its rates without 30 days' notice to the Commission, unless the Commission shall, for good cause shown, waive this requirement. There is no question that had Arkla given the Hall group the notice of the government royalty payments that the Louisiana courts held Arkla was required by contract to give, the Hall group would have been required to comply with Sections 4 and 5 of the Natural Gas Act in seeking to charge the higher rate. The question, then, is whether consideration of the matter in the context of a state court contract action (involving rates for past sales) takes the matter outside the purview of the Natural Gas Act. The Louisiana Supreme Court held that it does. We disagree.

State courts—and Federal courts as well—may have a wide variety of actions between natural gas companies and their customers brought before them. Obviously, not all damage awards are barred by the Federal preemption and the assignment of regulatory responsibility to this Commission, but some are. To pick the two extremes, damages for an automobile accident between an Arkla vehicle and a Hall group vehicle are not barred, but an order in a state court action on a contract purporting to set the rate for prospective sales of natural gas in interstate commerce is barred. We believe that this case is merely the latter example presented in slightly different form, and that the policy considerations underlying the statutory and common law establishment of the filed rate doctrine dictate the conclusion that the Natural Gas Act applies to Louisiana's award of damages to the Hall group for the 1961-1972 period.

The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.

A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, "just and reasonable". As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission "exclusive powers . . . to determine what those rates are to be." *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951).

In the case before us, the effect of the Louisiana Supreme Court's holding is to permit the collection of a rate different from and higher than the rate the Hall group had on file with the Commission, and to permit the collection of this higher rate without the Commission's having determined that the different and higher rate is just and reasonable.

The Louisiana Supreme Court appears to have recognized in some respects that the award to the Hall group has the effect of increasing the rate for gas sold during the 1961-1972 period above the rate

on file during that period, but the Court applied Article 2040 of the Louisiana Civil Code to "consider fulfilled" the Section 4(c) filing requirement. 368 So. 2d at 990. But state law cannot be a legitimate basis for relieving a natural gas company of an obligation under the Natural Gas Act. What is more, the effect of the Louisiana decision is to undo the certainty of the applicable rate discussed above.

The Louisiana Supreme Court did not directly confront the question of whether it was making a just and reasonable rate determination and thus overstepping its authortiy. Rather, the Court reasoned that it was only attempting to remedy a contract breach, and that it was speculating about the Commission's likely response to a timely filing by the Hall group only for the purpose of calculating the damages that the Hall group probably suffered as a consequence of Arkla's breach. While we do not question the adequacy of this reasoning under Louisiana law, we believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

The case most closely on point is *Montana-Dakota, supra.* Although the question at issue in *Montana-*

Dakota was somewhat different, since the case arose when plaintiff sought damages grounded in fraud in a federal district court, there is much in *Montana-Dakota* to provide guidance here. In particular, the court stated (341 U.S. at 251) that "[petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [14] Thus, the most the Louisiana courts were empowered to do in this circumstance as to the 1961-1972 period was to construe the contract (the Commission having disclaimed primary jurisdiction) and reach the conclusion that under the contract the Hall group was entitled to file a rate increase application with the Commission.

Cities Service is not to the contrary. There the court found that Cities Service had breached its contractual obligation to cooperate with Western in an abandonment proceeding before the Commission. Accordingly, *Cities Service* was ordered to pay damages

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[14] Mr. Justice Jackson, speaking for the majority, stated later in the opinion (341 U.S. at 252) that "if the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act." As we have noted (fn. 5 *supra*), the Louisiana courts were unable, on the record before them, to find such active fraud or deceit. Thus we do not believe that, in this instance, the Louisiana courts have the authority to authorize a price other than the filed rate for natural gas sold in interstate commerce. However, this Commision, in determining whether good cause exists for waiver of the notice requirements of Section 4(d), may take into account and attribute appropriate weight to the withholding from the Hall group of the information necessary for the Hall group to determine that it was entitled under the contract to file a rate increase application with the Commission.

to compensate Western for the money Western had lost as a result of its inability to market its gas elsewhere. Thus, in *Cities Service*, there was no dispute between the parties regarding the proper interpretation of the price terms of their contract. Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies reflecting a putative increase in the price at which gas had been sold in past transactions.[15] Accordingly, the litigation in *Cities Service* had no impact upon the Commission's obligation to ensure that interstate sales

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[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable. As the court stated in Cities Service (535 F.2d at 1287):

> [T]he Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the natural gas act to pay the just and reasonable rate for gas served and delivered to it . . . .

By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract.

of gas are made in accordance with the rate and filing requirements prescribed in Sections 4 and 5.

B. *Merits of Hall's Request for Waiver of Section 4(d)*

This holding does not, however, end the inquiry. The Hall group has asked in the alternative that we waive the filing requirements of Section 4(d) for good cause so as to give effect to the Louisiana court's finding on the contract as of 1961.

In the circumstances of this case, we are unable to conclude that good cause exists to waive the Section 4(d) filing requirements. The basis for our view that waiver would be inappropriate is the long-established "statutory bias" against retroactive rate increases.[16] What makes the rate increases in this case particularly unacceptable is the uncommonly severe nature of the retroactivity proposed. Hall is here attempting to expose consumers to a potential liability for higher rates beginning in 1961 and continuing for some 11 years thereafter. This we simply cannot sanction.

We are also very concerned about the possible unsettling effect that a waiver in this case might have on other gas purchase transactions. If the Hall group is granted a higher rate for its gas effective in 1961, there is a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions[17] in other

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[16] *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir., 1978) describing the effect of the filed rate doctrine.

[17] In 1961, the Commission outlawed most indefinite pricing provisions in newly-executed contracts. Such provisions in existing contracts, however, could continue to operate. Order No. 232, 25 FPC 379 (1961); *The Pure Oil Company*, 25 FPC 383 (1961).

contracts in the Sligo Field geographical area, quite possibly involving pipelines other than Arkla.[18] This, of course, would open the door to additional rate increase requests and requests for waiver for the same period. As a matter of policy, we do not believe it is in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago. The potential impact of such reopenings on our regulatory responsibilities appears substantial.[19]

Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. The filing would, of course, have been based upon the Hall group's contention that a royalty payment activated its favored nations clause. Since a question of contractual authorization for the rate increase would have arisen, the Commission, we believe, would almost certainly have either suspended or rejected the filing.[20] Whether the Commission in

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[18] Our records indicate that there may be a number of contracts so affected. Some contracts signed by other pipelines contain clauses which are triggered upon the payment of a higher price by any buyer in a geographical area.

[19] We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation.

[20] The Louisiana Supreme Court assumed that the Commission would have accepted the filing, based upon the November 8, 1976, order of the FPC. 368 So.2d at 991. How-

1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; under the grounds asserted by the FPC in 1976 for disclaiming primary jurisdiction over the contract interpretation question and under the different grounds adopted by the Commission in its May 18, 1979, order, the Commission would have taken jurisdiction over the contract interpretation in 1961. At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts.[21]

We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group. But the Louisiana courts did not find active fraud or deceit in this withholding of information, and our own review of the record before us leads us to con-

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ever, neither the FPC in 1976 nor the Commission today purports to declare what the FPC's actions would have been in 1961.

[21] As we have already noted, the Commission acted in 1961 to outlaw indefinite pricing provisions and deny effect to newly-executed contracts. If the Commission had extended this policy to such clauses in existing contracts, it might have done so only where government royalty payments were involved; or it might have done so across-the-board.

clude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group. More importantly, as is discussed at some length above, we must place this particular case in the context of our broader regulatory responsibilities. And on balance, after considering the matter in this broader context, we cannot accept the potential for disruption of natural gas markets or the speculation as to how our predecessors would have acted nineteen years ago. Therefore, we deny waiver.

In summary, we find that good cause does not exist to waive notice provisions of Section 4(d). Accordingly, the Hall group's application will be denied.

The Commission orders:

The Hall group's request for a waiver of the filing requirements prescribed in Section 4(d) of the Natural Gas Act is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

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No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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v.

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PETITIONER'S BRIEF ON THE MERITS

QUESTIONS PRESENTED

(1)

Whether the court below erred as a matter of jurisdiction and law in awarding Respondents, as damages for breach of contract, a retroactive price increase for their natural gas sold to Petitioner in interstate commerce for resale which, aggregated with the price already paid under the contract, is a price higher than the Respondents' rate on file with the Commission in accordance with the *Natural Gas Act.*

(2)

Whether the Supreme Court of Louisiana erred in approving the actions of the trial court and of the Louisiana Court of Appeal in affirming their own jurisdiction and declining to refer to the Federal Energy Regulatory Commission ("FERC" or "Commission")[1] for decision the question of the interpretation of the favored nation price escalation provision of Respondents' FPC Rate Schedule, and

(a) whether, if the state court had jurisdiction, its finding that the favored nation provision was activated was correct, and

(b) if the favored nation provision was activated, whether the court below might determine (as it did) the prices that Respondents might legally collect from Petitioner under the *Natural Gas Act* and the Regulations thereunder.

(3)

Whether the ruling below as to the small producer status of Respondents was in accordance with the *Natural Gas Act* and the Commission Regulations.

PARTIES

The names of all parties to this proceeding are stated in the caption of the case in this Court, as given above.

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[1] Under the Department of Energy Organization Act, 42 U.S.C. Section 7172(a)(1)(C), (D), (E), and (F), the FERC succeeded to the relevant functions and responsibilities of the former Federal Power Commission ("FPC") on October 1, 1977. The term "Commission" refers to the FPC or the FERC, as the context indicates.

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PETITIONER'S BRIEF ON THE MERITS

I. OPINIONS AND JUDGMENTS BELOW

The opinion and decree of the Supreme Court of Louisiana is reported at 368 So.2d 984 (La. 1979), J.A. 51. Petitioner's application to that court for rehearing was denied April 9, 1979, J.A. 68.

Earlier opinions in the suit are as follows:

Opinion of the First Judicial District Court, Caddo Parish, Louisiana, on the merits, J.A. 7, October 14, 1977.

Opinion of the district court denying new trial, J.A. 22, December 2, 1977.

Judgment of the trial court, J.A. 27, December 5, 1977.

Opinion and decree of the Court of Appeal, Second Circuit, State of Louisiana, J.A. 29, May 1, 1978, 359 So.2d 255.

Order of the Court of Appeal, Second Circuit, State of Louisiana, denying applications of Petitioner and Respondents for rehearing, J.A. 48, June 6, 1978.

Order of the Supreme Court of Louisiana denying Petitioner's application for review of the judgment of the Louisiana Court of Appeal, J.A. 50, September 22, 1978, 362 So.2d 1120.

Order of the Supreme Court of Louisiana granting Respondents' application for review of the judgment of the Louisiana Court of Appeal, J.A. 49, September 22, 1978, 362 So.2d 798.

Proceedings in the case subsequent to the judgment of the Supreme Court of Louisiana culminated in a money judgment against Petitioner and in favor of Respondents (J.A. 69, May 17, 1979) which was affirmed by the Louisiana Court of Appeal (J.A. 72, January 22, 1980, 379 So.2d 1142), review denied by the Supreme Court of Louisiana (J.A. 86, May 2, 1980, 383 So.2d 800), and which is sought by Petitioner to be reviewed in this Court by a petition for *certiorari*, No. 79-1896, pending at the time this brief is written. Copies of proceedings in the case subsequent to the judgment under review here are contained in the record as certified by the clerk of the state court and the opinions and judgments are in Joint Appendix B, J.A. 5, *et seq.*

II. JURISDICTION

The judgment of the Supreme Court of Louisiana was entered March 5, 1979, rehearing was denied on April 9, 1979, and the petition for *certiorari* was filed in this Court on May 29, 1979, within the time allowed by U.S. Code, Title 28, Section 2101(c). The judgment of the Supreme Court of Louisiana of which review and reversal are here sought is a final judgment within the meaning of the jurisdictional statute, U.S. Code, Title 28, Section 1257(3).

III. STATUTES AND REGULATIONS INVOLVED

Petitioner's claims in this suit are based upon the supremacy clause of the Constitution of the United States, Article VI, by reason of the fact that Petitioner has been denied its rights under Section 4 of the *Natural Gas Act,* 52 Stat. 822, 15 U.S.C. Section 717c, and Regulations thereunder of the Commission, *Code of Federal Regulations,* Title 18, Sections 154.92, 154.93, 154.94, 154.95 and 157.40, copies of which are attached in the appendix to this brief, pages 5a, 7a, 8a, and 13a respectively.

IV. STATEMENT OF THE CASE

Petitioner ("Arkla") is an integrated gas utility engaged in all phases of the natural gas business in Arkansas, Louisiana, Texas and Oklahoma, and to a limited extent in Kansas and Missouri. It is a "natural gas company" as that term is defined in Section 2(6) of the *Natural Gas Act,* subject to the jurisdiction of the Commission.[2] Respondents are engaged in the production of natural gas and the sale thereof to Arkla in interstate commerce for resale. Respondents also are "natural gas companies," as defined in Section 2(6) of the *Natural Gas Act,* subject to the jurisdiction of the Commission.[3]

On January 11, 1952, Respondents, or their predecessors, entered into a written agreement with Arkla (reproduced at J.A. 87) providing for the sale at the wellhead to Arkla of the entire natural gas stream (including the liquefiable hydrocarbons contained in

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[2] The *Natural Gas Act,* 15 U.S.C. Section 717a(b), defines "natural gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[3] *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954).

the stream of natural gas but not condensate, *i.e.,* oil) to be produced from Respondents' wells in the Sligo Gas Field, Bossier Parish, Louisiana, for a primary term expiring in 1980.[4] After *Phillips Petroleum Company, supra,* Respondents filed for and received a Certificate of Public Convenience and Necessity from the Commission authorizing the sales. The 1952 contract was filed with the Commission and became Respondents' FPC Gas Rate Schedule No. 4. Under the price provisions of this contract, the price per one thousand cubic feet (Mcf) to be paid by Arkla to Respondents for wet gas was $0.06997 with escalations each five years until the price became $0.11496 in 1975.[5]

Section 8(D) of Respondents' Rate Schedule contains the escalation provision which the parties refer to in this suit as the "favored nation provision." So far as here relevant, the provision is as follows (J.A. 99-100):

> "If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other

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[4] All natural gas when produced contains in varying degrees liquefiable hydrocarbons in a gaseous state. Natural gas including these liquefiable hydrocarbons is known as wet gas. These liquefiable hydrocarbons are extractable and after extraction and processing are saleable in liquid form as a separate product. When natural gas is sold excluding the extractable hydrocarbons, the sale is known as a sale of dry gas. Under the contract Respondents sold Arkla wet gas. The Commission's rate regulations prescribe the same maximum rate for wet and dry gas. The court below awarded Respondents the market value of the extracted liquid hydrocarbons in addition to the price of gas as though the sale was only of dry gas, thereby awarding Respondents a rate almost twice the maximum rate permitted by the Commission.

[5] The term "price" is synonomous with the term "rate or charge" as used in Sections 4 and 5 of the *Natural Gas Act,* 15 U.S.C. Sections 717c and d.

well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures (provided that the number of years stated as the terms during which the two contracts shall respectively remain in force and effect shall not be a factor to be considered for purposes of comparison under this paragraph) and the price to be thereafter payable in accordance with this paragraph for gas delivered hereunder shall be adjusted accordingly insofar as may be necessary to make allowances for any discrepancies as may exist between such comparable provisions of the two contracts. It is agreed that any such higher price for gas delivered hereunder shall be effective on the first day of Buyer's accounting month (as elsewhere herein defined) next following the effective date of such subsequent contract, all subject, however, to any rules and regulations of the Office of Price Stabilization or any other regulatory body having jurisdiction."

Proceedings in the Trial Court

This suit was begun in 1974 in the First Judicial District Court of Louisiana in and for Caddo Parish. The original petition of the Plaintiffs, Respondents herein, (R. 13) claimed that payments made by Arkla to the United States (which were made beginning in 1961) as royalty under an oil and gas lease (covering parts

of the Barksdale Field Reservation in Bossier Parish in the Sligo Gas Field) (J.A. 121) constituted purchases of gas from a "party seller" and "triggered" the favored nation provision; and that Arkla thereby incurred substantial liabilities to Respondents for higher rates for gas sold. Respondents' original petition was superseded by an amended petition (R. 763) stating Respondents' claims in terms of damages for breach of contract, measured by the difference between the rate paid by Respondents under the Rate Schedule and the royalty payments under the lease. Petitioner raised and preserved federal defenses, including the defense that primary and exclusive jurisdiction over the issues was in the Commission under the *Natural Gas Act* and that the state court was without subject matter jurisdiction.

Under the provisions of the lease, the United States government, at its option, was entitled to a royalty either of 16⅔% of the volume of the production obtained from the leased lands or its value. Under the terms of the government lease and the authority of the *Mineral Leasing Act,* 30 U.S.C. Sections 226, *et seq.,* the Department of the Interior, acting through the United States Geological Survey, had the right to make a binding determination as to the values of the extracted liquid hydrocarbons and gas produced by the lessee for the purpose of computing the amount of the value royalties. The government exercised this right by notice to Arkla fixing separate values for gas and extracted liquid hydrocarbons produced by Arkla under the government lease. Arkla has paid royalties to the United States under the government lease, calculated as 16⅔% of the separate values of Arkla's 15% of the production from the government lease of both residue gas and liquid hydrocarbons, determined, as required by the lessor, with no deduction for the cost of extraction and processing. Since the unit values re-

quired by lessor for the royalty payments for gas were higher than Respondents' wellhead price to Arkla, Respondents claimed that the favored nation provision was triggered.

Opinions and Judgment of Trial Court

The Louisiana District Court entered two opinions —on October 14, 1977 (J.A. 7) and on December 2, 1977 (J.A. 22). That court held that as a matter of Louisiana oil and gas law, the United States owned the royalty percentage (16⅔%) of the gas as it was produced, that, therefore, the value royalty paid by Petitioner was paid as the sales price for gas sold by the government to Arkla, and that, consequently, the royalty payments triggered the favored nation provision of the contract.

The trial court also held, on the authority of the Louisiana decision of *Interstate Natural Gas Co.* v. *Mississippi River Fuel Corp.*, 220 La. 43, 55 So.2d 775 (1951), that Respondents could not recover a higher price (*i.e.*, a rate increase) for gas sold during the period 1961 to October, 1972 (at which latter date the court held that Respondents attained the status of small producers[6]) because they had made no Commission filing for the increased contractual rate as required by the *Natural Gas Act*. The court granted them judgments (J.A. 27) for its calculated "favored nation"

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[6] Under the Commission Regulations, 18 C.F.R. Section 157.40, a small producer is excused from the rate-change filing requirements of Section 4(d) of the *Natural Gas Act*, which are among the prerequisites to the right to charge increased rates. Another prerequisite is that the contract confer on the seller a right to charge the rate unilaterally. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Shell Oil Co., et al.*, 29 FPC 498 (1963), *aff'd.*, *Shell Oil Co.* v. *FPC*, 334 F.2d 1002 (3d Cir. 1963).

price increase for the period October, 1972, through December, 1975.

The demands of one of the Respondents, W. E. Hall, Jr., were rejected on the ground that he had agreed to an amendment of his contract with Arkla deleting the favored nation provision, and this ruling has been affirmed both in the Louisiana Court of Appeal and the state Supreme Court. It should also be stated that by an earlier opinion (J.A. 5) the District Court had entered an interlocutory order overruling Petitioner's declinatory exception to the court's jurisdiction. The exception was based on the ground that the Commission was vested with primary and exclusive jurisdiction over the questions presented by the lawsuit.[7]

Opinions of Court of Appeal

On appeal by all parties to the Louisiana Court of Appeal, Second Circuit, that court rejected the trial court's finding that the federal government owned the royalty percentage of the gas and sold it to Arkla. The Court of Appeal found further that Arkla's payments to the federal government were payments of rent and were not the payment of the price of a sale. Nevertheless, the Court of Appeal affirmed the trial court's

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[7] Following the overruling of its declinatory exception, Petitioner filed a petition with the Commission for a declaratory order construing Respondents' Rate Schedule and determining the rates at which each of Respondents was entitled to be paid in the period involved in this suit. Although agreeing that it had jurisdiction, the Commission ruled that since an action was pending in the state court, it would defer to the state court and declined to entertain the petition. The Commission's orders are on review in the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 77-1146 and 79-2068, *Arkansas Louisiana Gas Co.* v. *FERC*), where the review proceedings are now pending.

judgment in all respects except as to *quantum*, saying (J.A. 36):

> "We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

The court concluded that the favored nation provision should be construed in the interest of the seller and held that it was activated.

As to *quantum*, the Court of Appeal reversed and remanded the judgment for recalculation with directions in accordance with its opinion.

Proceedings in and Opinion of the Louisiana Supreme Court

Respondents applied to the Supreme Court of Louisiana for review of the Court of Appeal's judgment and decree insofar as they rejected their demands, and Petitioner applied for review of that part of the judgment against it. Respondents' application was granted and Petitioner's application was denied by separate orders entered September 22, 1978 (J.A. 49 and J.A. 50).

The decision of the Supreme Court of Louisiana (J.A. 51) amended the judgment entered by the Louisiana Court of Appeal, Second Circuit, by awarding higher rates to Respondents for the period of time Respondents had not complied with the applicable filing requirements of the *Natural Gas Act* and the Commission's Regulations which were a prerequisite to the right to collect the higher rates.[8] The Supreme Court of

[8] The Court of Appeal had previously determined that Respondents could not collect higher rates during this period of time that they were subject to the rate increase filing requirements of Section 4(d) of the *Natural Gas Act*, 15 U.S.C. Section 717c(d) (J.A. 40-41). The period of time involved was that period before several of the Respondents achieved small producer status in October, 1972.

Louisiana determined that Respondents were prevented by Arkla from fulfilling the rate increase filing requirements of the *Natural Gas Act* because Respondents were not informed that Petitioner had made market value royalty payments to the United States government, which royalties were calculated on the basis of higher values than the prices paid by Petitioner to Respondents (J.A. 60).[9] The court held that in these circumstances, Respondents were excused from compliance with the *Natural Gas Act,* saying (J.A. 60-61):

> "Pursuant to article 2040 [of the Louisiana Civil Code] and this court's jurisprudence interpreting that article, the condition (that [Respondents] file new rate schedules) is considered fulfilled. Hence [Respondents'] failure to file new rate schedules in no way precludes [Respondents'] recovery of damages for the entire period of [Petitioner's] breach (September 1961 through December 31, 1975) as measured by the differences in the price [Petitioner] paid the United States government and the price [Petitioner] paid [Respondents]. To hold otherwise would be in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court."

The court also determined that having eliminated the statutory rate increase filing requirements under

[9] The foundation of the decision was the "triggering" issue—that is, whether Petitioner's market value royalty payments triggered the favored nation provision in Respondents' FPC Rate Schedule. Having denied Petitioner's application for review, the Supreme Court of Louisiana applied the Court of Appeal's determination that triggering had occurred. It is Petitioner's position that the triggering issue should have been referred to the Commission for decision and that the state court decision is contrary to federal regulatory law. *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256 (D.C. Cir. 1971), *cert. denied sub nom., Mobil Oil Corp.* v. *Matzen,* 406 U.S. 976 (1972).

the *Natural Gas Act* it could determine the rate that the Commission would have authorized Respondents to collect.[10]

The Supreme Court of Louisiana remanded the proceeding to the state District Court for a calculation of the price increase to be awarded Respondents in the form of damages for breach of contract (J.A. 66).

V. SUMMARY OF ARGUMENT

I.

The state court undertook to construe the favored nation provision in Respondents' Rate Schedule on file with the Commission and concluded that Petitioner's royalty payments under a United States government lease triggered the favored nation provision and entitled Respondents to an increase in rates for their sales of natural gas for resale in interstate commerce to Petitioner. The state court awarded Respondents an increase in rates based on this conclusion.

The state court thereby usurped the Commission's jurisdiction since such sales and the rates therefor are conclusively within the Commission's exclusive jurisdiction under the *Natural Gas Act*. *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954); *Natural Gas Pipeline Co.* v. *Panoma,* 349 U.S. 44 (1955).

The state court's effort to avoid this usurpation of the Commission's jurisdiction by labeling the increased rates as "damages" is unavailing. The state court "cannot separate what Congress has joined together." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951).

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[10] As Petitioner hereinafter shows, this ruling emphasizes the court's error in failing to refer to the Commission these matters which involve its primary and exclusive jurisdiction. These matters should not be the subject of speculation by the courts. See *infra,* pp. 26-37.

Rates are at the heart of the matter. Respondents cannot show damage save by showing that the Commission would approve some rate structure and some practice other than the presently effective rate structure on file with the Commission. *Interstate Natural Gas Co.* v. *Southern California Gas Co.,* 102 F.Supp. 685 (S.D. Ca. 1952); *Atlantic Richfield Co.* v. *Northern Natural Gas Co.,* No. CA-3-1548-G (N.D. Texas, filed December 1, 1977), *appeal docketed,* No. 78-1112 (5th Cir. 1978). Indeed, the state court in order to award the "damages" found it necessary to rule that Respondents were excused from the rate-change filing requirements of the *Natural Gas Act* [Section 4(d)] and that the Commission would have allowed the increased rate established by the state court to assess damages. As the Commission has said of the state court's judgment: "the Louisiana courts have, in effect, determined a rate that, in their view should have been the just and reasonable rate—a determination that is within this Commission's exclusive jurisdiction." Supplemental Memorandum For the United States and the Federal Energy Regulatory Commission as *Amici Curiae,* App. 11a, n. 15, on petition for *certiorari* in this case.

The judgment of the state court also violated the filed rate doctrine which means in the context of the *Natural Gas Act* that a natural gas company can claim no rate as a legal right that is other than the filed rate and that not even a court can authorize commerce in the commodity on other terms. *Montana-Dakota, supra.*

II.

The Louisiana courts' decisions wrongfully intrude upon the Commission's primary jurisdiction. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907); *United States* v. *Western Pacific Railroad Co.,*

352 U.S. 59 (1956); *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 242-43 (1959). The Commission's plenary rate jurisdiction extends to and includes all matters relating to the determination of the rate to be charged and collected in gas sales transactions subject to the *Natural Gas Act.* It includes the primary jurisdiction to interpret a rate schedule which would affect the rate applicable to the transaction especially when the Commission's expertise is involved or when the need for uniformity exists. *Northern Natural Gas Co.* v. *State Corp. Commission,* 372 U.S. 84, 85, 92 (1963); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 114 (1958); *Appalachian Power Co.* v. *FPC,* 529 F.2d 342, 351 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 816 (1976); *Zachary* v. *FERC,* 621 F.2d 155 (5th Cir. 1980); *Texas Oil & Gas Corp.* v. *Valley Gas Transmission, Inc.,* 608 F.2d 231, 234 (5th Cir. 1979); *Atlantic Richfield Co.* v. *Northern Natural Gas Co., supra.*

Under the *Natural Gas Act,* although contracts are initially established by the parties through private agreement, once the contracts are filed with the Commission as rate schedules under Section 4(c) of the Act, the full panoply of the Commission's rate authority attaches to the contract. *Id.;* see also *Carter* v. *AT&T Co.,* 365 F.2d 486, 496 (5th Cir. 1966): ". . . a tariff, required by law to be filed, is not a mere contract. It is the law." The "paramount and exclusive" jurisdiction of the Commission over a gas sales contract on file with the Commission as a rate schedule has been judicially recognized. *Id.*

The Commission has regularly interpreted the contracts on file with it as rate schedules and the courts have uniformly recognized the Commission's authority

to interpret contracts as an essential element of its rate regulation. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra.* Additionally, the courts have deferred to the Commission's expertise and competence with respect to technical matters and industry practices which are the Commission's daily fare. *Indiana & Michigan Electric Co.* v. *FPC,* 530 F.2d 1060, 1062 (D.C. Cir. 1976); *New England Power Co.* v. *FERC,* 571 F.2d 1213 (D.C. Cir. 1977); Cf. *Western Union Telegraph Co.* v. *FCC,* 541 F.2d 346, 351, 357, n. 7 (3d Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977). Indeed, due to the Commission's special competence, expertise and the deference accorded the Commission's interpretations in matters subject to its rate authority, even legal questions and matters that do not involve its rate authority have been referred to the Commission under the doctrine of primary jurisdiction to secure its opinion in the first instance. *J. M. Huber Corp.* v. *Denman,* 367 F.2d 104, 111-12 (5th Cir. 1966); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.,* 532 F.2d 412, 417 (5th Cir. 1976); *Carter* v. *AT&T Co., supra,* 365 F.2d at 498.

This case requires the Commission's expertise and the uniform application of regulatory policy regarding the triggering of a favored nation provision in a producer's sales contract. *Zachary* v. *FERC, supra; Atlantic Richfield Co.* v. *Northern Natural Gas Co., supra.* The Commission has considered this precise issue on many occasions and has developed a regulatory policy as to triggering. *Shell Oil Co., et al.,* 29 FPC 498, 499 (1963), *aff'd., Shell Oil Co.* v. *FPC,* 334 F.2d 1002 (3d Cir. 1963); *West Texas Gathering Co.,* 29 FPC 510 (1962); *Morris Mizel, et al.,* 30 FPC 1103, 1104 (1963). Recognition of the Commission's primary jurisdiction to decide the contract triggering issue is inseparable from the Commission's exclusive rate juris-

diction. *Atlantic Richfield Co.* v. *Northern Natural Gas Co., supra; Zachary* v. *FERC, supra.*

In the determination of whether the lease royalty payments made by Petitioner to the government were in fact higher than the sales rate paid to Respondents, and if so, how much higher, the Rate Schedule itself, in addition to the Commission's policy regarding triggering, requires an examination of other technical provisions of the Rate Schedule (*e.g.,* the point of delivery, payment for extracted products, basis of measurement, taxes, dehydration and delivery pressures). Additionally, Respondents have argued that they are entitled to separate recovery for "residue gas" and for "extracted plant products." These matters clearly involve the Commission's expertise. The excessive level of the retroactive rate increase awarded by the Louisiana courts also demonstrates that the issue regarding triggering of the favored nation provision is inseparable from the Commission's exclusive rate jurisdiction.

The Louisiana court's finding that the favored nation provision was activated is incorrect because it is inconsistent with the controlling federal regulatory law. *Northern Natural Gas Co.* v. *State Corp. Commission, supra; United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392, 400 (1965); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95, 103 (1962). Petitioner's payment of lease royalties to the United States government did not activate the favored nation provision under federal regulatory law which controls the triggering issue. *Appalachian Power Co.* v. *FPC, supra; California* v. *Southland Royalty Co.,* 436 U.S. 519, 530-31 (1978); *Jicarilla Apache Tribe* v. *FERC,* 578 F.2d 289, 292 (10th Cir. 1978). The settled federal regulatory law is that a royalty settlement under an ordinary

market value lease is not in fact a sale of gas. *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256, 262 (D.C. Cir. 1971), *cert. denied sub nom., Mobil Oil Corp.* v. *Matzen,* 406 U.S. 976 (1972). This rule has been applied consistently by the courts and the Commission in the interpretation of favored nation provisions. *Morris Mizel, et al., supra; Jicarilla Apache Tribe* v. *FERC, supra.* The Louisiana court's interpretation of the favored nation provision is also at odds with the plain terms of the agreement itself which specified that triggering would occur only if there were a "purchase from another party seller" and distinguished between a purchase and a royalty transaction. The holding by the Louisiana court that the contract should be interpreted broadly so as to favor the seller is wholly inconsistent with the dominant price reducing purpose of the *Natural Gas Act. Phillips Petroleum Co.* v. *Wisconsin, supra; United Gas Improvement Co.* v. *Continental Oil Co., supra.* There are adverse policy implications for the gas industry resulting from the Louisiana court's interpretation of the favored nation provision. Martin, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Mineral Rights,* 40 LA.L.REV. 588, 601 (1980).

III.

The Louisiana courts erred (i) in determining which of the 15 independent producers who are Respondents herein are "small producers," and (ii) in determining that the small producer exemption from certain rate filing requirements removed the cause of action from the Commission's primary and exclusive jurisdiction under the *Natural Gas Act.*

The Louisiana courts wrongfully interpreted these regulations as permitting the courts to award a retroactive rate increase in the guise of damages during the

period that Respondents were alleged to be small producers.

The Commission's primary and exclusive jurisdiction extends to small producers. *Phillips Petroleum Co.* v. *Wisconsin, supra; FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974); *Jicarilla Apache Tribe* v. *FERC, supra.* Small producers are subject to the Commission's exclusive rate regulation under the *Natural Gas Act. Id.* Similarly, small producer contract disputes fall within the Commission's primary jurisdiction. *Zachary* v. *FERC,* 621 F.2d 155 (5th Cir. 1980); *Jicarilla Apache Tribe* v. *FERC, supra.*

Only 5 of the 15 independent producers who are Respondents here are small producers under the Commission's regulations, 18 C.F.R. Section 157.40. If the Louisiana court's decision is upheld, the 10 Respondents who have not qualified as small producers would collect the higher rates set by the court without a proper regulatory determination that they are entitled to collect such higher rates.

VI. ARGUMENT

I. The Decision Below Has Usurped the Commission's Exclusive Rate Jurisdiction and Violated the Filed Rate Doctrine

A. The Commission's Jurisdiction over Respondents' Rates Is Exclusive

The regulation of rates for the sale of natural gas for resale in interstate commerce by producers of natural gas (here Respondents) was vested by Congress exclusively in the Commission under the *Natural Gas Act*. This proposition is well-established judicially and is not open to debate. *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581 (1945); *Phillips Petroleum Co.* v. *Wisconsin, supra; Natural Gas Pipeline Co.* v. *Panoma,* 349 U.S. 44 (1955); *FPC* v. *Oklahoma Corpora-*

tion Commission, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd.,* 415 U.S. 961 (1974).

In the *Panoma* case, *supra,* this Court, in a *per curiam* opinion, struck down an attempt by the State of Oklahoma to fix a price for natural gas that was sold in interstate commerce, saying (349 U.S. at 44):

> "In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 US 672, 98 Led 1035, 74 SCt 794, that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The *Phillips* case, therefore, controls this one."

Similarly in *Oklahoma Corporation Commission, supra,* the district court there found that orders of the Oklahoma Commission relating to the wellhead price of natural gas "conflict[ed] with the jurisdiction of the Federal Power Commission under the Natural Gas Act." 362 F.Supp. at 537. The court concluded, citing *Panoma, supra,* 362 F.Supp. at 538:

> "The State has no authority, either directly or indirectly, to fix the prices at which natural gas is sold in interstate commerce."

The Fifth Circuit Court of Appeals has addressed the problem of a contract change in the same context of a "favored nation" provision in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F.2d 388, 390 (5th Cir. 1947), *cert. denied,* 332 U.S. 770 (1947):

> "Rate-making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate

to transfer the legislative function of rate-making from the Commission to the courts."

In *Natural Gas Pipeline Co.* v. *Harrington,* 246 F.2d 915, 918 (5th Cir. 1957), the same court passed on a claim by the pipeline for reparations because of sums paid to a producer under an invalid minimum price order of the Oklahoma State Corporation Commission:

> "Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable, and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission . . . ."

In the present case, the court below usurped the Commission's exclusive rate jurisdiction by awarding Respondents an increase in rates on the theory that the favored nation provision of the Rate Schedule between Respondents and Arkla had been activated and that Respondents were entitled to the increase without having to comply with the rate-change filing requirements of Section 4(d) of the *Natural Gas Act* and the Commission's Regulations thereunder (18 C.F.R. Section 154.63). The court below accomplished all this (i) without any determination by the Commission that the favored nation provision had, indeed, been activated; (ii) without consideration of all of the factors that must be considered under the terms of the contract to determine activation of the provision; (iii) without any determination that the increase in rates was just and reasonable and did not exceed the Commission's area or ceiling rates; and (iv) without any determination by the Commission that Respondents had complied with the filing requirements of the *Act* and Regulations before an increase in rates could be made effective.

The court below sought to justify this usurpation of the Commission's exclusive rate jurisdiction on the ground that the court was providing only for the recovery of damages arising from a breach of contract. By labeling the increased rate as damages, the court below "cannot separate what Congress has joined together." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951).

The effort of the court below to label the judgment as damages for breach of contract will not stand scrutiny. In determining the damages the court below found it necessary (i) to rule that Respondents should be considered as having fulfilled the filing requirements of Section 4(d) of the *Natural Gas Act,* which are a prerequisite to lawful collection of an increase in rates (J.A. 60), and (ii) to find that the increased rate established by the court to assess damages would have been allowed by the Commission if the Respondents had filed the rate increase with the Commission (J.A. 62). These findings disclose that the establishment of rates under the *Natural Gas Act* was at the heart of the matter.[11]

The inefficacy of the label "damages" when, in fact, rates are at issue, has been addressed by the courts. *Interstate Natural Gas Co.* v. *Southern California Gas*

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[11] In finding that Respondents should be considered as having fulfilled the filing requirements of the Act, the court below relied on the Civil Code of Louisiana. Reliance on state law is unavailing (*infra,* pp. 23-25, 38-42). The Commission has exclusive jurisdiction over the rate increase filing requirements, and these paramount federal regulatory requirements cannot be undone by state law. *Ashland Oil & Refining Co.* v. *FPC,* 421 F.2d 17, 20 (6th Cir. 1970). Only the Commission can determine whether filing requirements under the *Act* have been fulfilled. In *Ashland* the Commission ruled that increased rates could not be collected because the filing requirements of Section 4(d) had not been met. The Sixth Circuit affirmed.

Co., 102 F.Supp. 685 (S.D. Ca. 1952); *Atlantic Richfield Co.* v. *Northern Natural Gas Co.,* No. CA-3-1548-G (N.D. Texas, filed December 1, 1977), *appeal docketed,* No. 78-1112 (5th Cir. 1978).[12]

In *Interstate,* the court said (102 F.Supp. at 688):

> "[T]he plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction. *The plaintiff cannot show damage save by showing that the Commission would approve some rate structure and some practice other than that presently existing.*" [Italics in original.]

So, here, too, the Respondents cannot show damage save by showing, as the court below recognized, that the Commission would have approved a rate structure other than the effective rate structure on file with the Commission.

In *Atlantic Richfield,* the federal district court was confronted with a fact situation essentially identical to that in the present case. The court, in deciding that it could not enforce escalation which had not been filed, said (App. 22-23a):

> "The courts do not have jurisdiction to determine a 'just and reasonable' rate for the sale of this gas. That jurisdictional anemia cannot be avoided by changing the label of 'just and reasonable' to damages for breach of contract. Only the FPC can determine the price paid for this gas. Both judicial and private price determination are thus foreclosed.

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[12] The *Atlantic Richfield* case is on appeal to the Fifth Circuit. That Court has stayed proceedings in the case pending the outcome of the present case. The decision of the district court and the Fifth Circuit's order are included in the appendix to this brief (App. 19a, 26a).

"Arco argues that this court can entertain this claim for recovery of the difference in value between what Arco was promised by Northern and what it received . . . . Arco argues that any opportunity to seek the FPC's approval was foreclosed by Northern's failure to notify Arco that it was paying a higher rate, a failure which Arco contends breached an obligation arising by implication from Northern's direct promise to pay a higher rate.

"Stating the contention takes one a long way toward its answer. Regardless of the label placed upon its claim, the result Arco seeks is a higher rate from Northern to Arco—without the FPC's approval. That conclusion is not altered by the FPC's area rate determination for the Permian Basin. That approved rate does increase the likelihood that the FPC, if requested, would have approved a higher rate paid by Northern to Arco, but it does not weaken the conclusion that, stripped of labels, Arco seeks a retroactive increase in rates, judicially promulgated."

The Commission in an order issued November 5, 1980 (see Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *Amici Curiae,* on petition for *certiorari,* filed in this case in response to the Court's invitation), denied Respondents' petition for waiver of the filing requirements of Section 4(d). Respondents relied on *Cities Service Gas Co.* v. *FPC,* 535 F.2d 1278 (D.C. Cir. 1976). Distinguishing the present case from the *Cities Service* case, the Commission rejected Respondents' contention that no waiver was required because damages, not rates, were involved, saying (Supp. Memo., App. 11a):

"Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies

reflecting a putative increase in the price at which gas had been sold in past transactions.[15]

"[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities Service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable.

* * * *

"By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract."

The conclusion is inescapable that the court below usurped the Commission's exclusive jurisdiction over Respondents' rate to Arkla.

B. *The Filed Rate Doctrine Was Violated*

It is also well-established judicially that a natural gas company can claim no rate as a legal right that is other than the filed rate and that not even a court can authorize commerce in the commodity on other terms. *Montana-Dakota Utilities, supra,* 341 U.S. at 251. This is the filed rate doctrine.

In *Montana-Dakota Utilities,* this Court, concluding that courts do not possess jurisdiction to award damages that are, in truth, rates established by the court

rather than the Commission, explained (341 U.S. at 250-52):

"Petitioner gives its case a differ [sic] cast by alleging that . . . its predecessor was deprived of its independence and power to resort to its administrative remedy. But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of the Commission action, creates no right which courts may enforce. Petitioner cannot separate what Congress has joined together. *It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms. We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can*

assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable." [Italics added.]

In its order of November 5, 1980, denying Respondents' request for waiver of the rate-change filing requirements of the *Natural Gas Act,* referred to above, pp. 22-23, *supra,* the Commission discussed the filed rate doctrine (Supp. Memo., App. 8a):

> "The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.
>
> "A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, 'just and reasonable'. As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission 'exclusive powers . . . to determine what those rates are to be.' "

The decision of the Supreme Court of Louisiana clearly violated the filed rate doctrine in relieving Respondents of compliance with the rate-change filing requirements of Section 4(d) of the Act and in establishing a rate for Respondents' sales other than the filed rate in derogation of the Commission's exclusive rate jurisdiction.

II. The Louisiana Courts' Decisions Wrongfully Intrude on the Commission's Primary Jurisdiction and Are Inconsistent With Applicable Regulatory Policy and Controlling Federal Law

A. *The Doctrine of Primary Jurisdiction Applies to this Case*

The fountainhead from which the entire primary jurisdiction doctrine flows is *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). In that case, the oil company sued the railway to recover charges paid in accordance with the rate on file with the Interstate Commerce Commission. The court acknowledged that at common law an action could have been maintained to recover the charges, but ruled that "a shipper seeking reparation [or an increase in rates] . . . must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule." 204 U.S. at 448. The rationale justifying this doctrine was described as follows, 204 U.S. at 441:

> "[T]he existence of such a power in the courts, independent of prior action by the Commission, would lead to . . . the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which . . . the wrongs which the statute was intended to remedy could be successfully inflicted."

United States v. *Western Pacific Railroad Co.,* 352 U.S. 59 (1956), is an especially instructive application of the doctrine of primary jurisdiction in terms of the instant controversy. This case established additional grounds for the application of the doctrine, namely, the special technical competence and expertise of an administrative agency and the need for uniform policy

with respect to the subject matter of regulation. The questions there were whether the Interstate Commerce Commission should first rule upon (i) the construction of a tariff and (ii) the reasonableness of the tariff as applied. The answer to each question the Court said, "depends on whether the question raises issues of [regulatory] policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." 352 U.S. at 65. The Court found that a determination of whether a higher rate should apply involves an inquiry into the reasons for the higher rate, and that familiarity with such reasons "is possessed not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance." 352 U.S. at 67.

This Court has consistently held that matters involving the interpretation of a tariff or rate schedule in these circumstances should be decided by the regulatory agency in the first instance. *Texas and Pacific Ry.* v. *American Tie and Timber Co.,* 234 U.S. 138 (1914); *Far East Conference* v. *United States,* 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932); *Port of Boston Main Terminal Association* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970); *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959). See also *Trans-Pacific Airlines* v. *Hawaiian Airlines,* 174 F.2d 63, 66 (9th Cir. 1949):

> "[W]here uniformity of interpretation of rules and consistency in application, in view of an overall policy, is compelled by the legislative mandate . . . [t]hen . . . there [is] not only a commitment of primary, but likewise of exclusive, jurisdiction to the administrative [body], and exhaustion of the remedies is mandatory." [Citation omitted.]

Similarly, in *San Diego Bldg. Trades Council* v. *Garmon, supra,* this Court was faced with a state court action awarding damages with respect to activities within the scope of another federal regulatory agency —the National Labor Relations Board. Although the case did not involve the interpretation of a rate schedule, the Court did explain why deference should be shown to the regulatory agency having plenary jurisdiction over an area of commerce. The Court stated, 359 U.S. at 243-44:

> " '*Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties.* It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.' [Citation omitted; italics added.]
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> * * * *
>
> "*Administration is more than a means of regulation; administration is regulation.* We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. [Italics added.]
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> * * * *
>
> "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements im-

> posed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes."

The instant controversy involves the determination of matters that clearly require the exercise of special competence and expertise of the Commission. Section 8(D) of Respondents' Rate Schedule provides that in determining whether Arkla has, in fact, purchased gas from another producer from wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under the Rate Schedule "due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures." These factors quite obviously involve areas of special technical competence and expertise of the Commission. These areas were, in fact, completely disregarded by the court below in concluding that the royalty payments under the government lease had triggered the favored nation provision.

B. *The Doctrine of Primary Jurisdiction Applies under the Natural Gas Act where Contractual Agreements Operate as Rate Schedules*

The lower court's rejection of Petitioner's position that the questions involved in the lawsuit were within the Commission's primary jurisdiction was based upon a misunderstanding of the decision of this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The lower court construed the Court's statements in *Mobile* that the *Natural Gas Act* evinces no purpose to abrogate private rate contracts

and to preclude parties initially to establish their contractual relationships as rendering inapplicable the doctrine of primary jurisdiction to the dispute in the lawsuit (J.A. 34).

Under the *Natural Gas Act,* although contracts are initially established by the parties through private agreement, once the contracts are filed with the Commission as rate schedules under Section 4(c) of the *Act,* as they must be if sales of natural gas for resale in interstate commerce are involved, the full panoply of the Commission's rate review authority attaches to the contract. The "paramount and exclusive" jurisdiction of the Commission over a gas sales contract on file with the Commission as a rate schedule has been judicially recognized. *Northern Natural Gas Co.* v. *State Corp. Commission,* 372 U.S. 84, 89, 92 (1963); *Appalachian Power Co.* v. *FPC,* 529 F.2d 342, 351 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 816 (1976); *New England Power Co.* v. *FERC,* 571 F.2d 1213 (D.C. Cir. 1977); *Gulf States Utilities* v. *FPC,* 518 F.2d 450 (D.C. Cir. 1975); *Zachary* v. *FERC,* 621 F.2d 155 (5th Cir. 1980). See also *Carter* v. *AT&T Co.,* 365 F.2d 486, 496 (5th Cir. 1966): ". . . a tariff, required by law to be filed, it is not a mere contract. It is the law."

The Commission has regularly interpreted the contracts on file with it as rate schedules and the courts have uniformly recognized the Commission's authority to interpret contracts as an essential element of its regulation of rates. Additionally, the courts have deferred to the Commission's contract interpretation because of the Commission's expertise and competence with respect to technical matters and industry practices which are the Commission's daily fare. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 114 (1958); *Gulf States Utilities* v. *FPC, supra,* 518 F.2d at 457; *Appalachian*

Power Co. v. *FPC, supra,* 529 F.2d at 351; *Columbia Gas Transmission Corp.* v. *FPC,* 530 F.2d 1056, 1059 (D.C. Cir. 1976); *Indiana & Michigan Electric Co.* v. *FPC,* 530 F.2d 1060, 1062 (D.C. Cir. 1976); *Zachary* v. *FERC, supra,* 621 F.2d at 157, 158; *New England Power Co.* v. *FERC, supra,* 571 F.2d at 1219, n. 22; *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corp.,* 614 F.2d 33, 36 (4th Cir. 1980); *Texas Oil & Gas Corp.* v. *Valley Gas Transmission, Inc.,* 608 F.2d 231, 234 (5th Cir. 1979). Cf. *Western Union Telegraph Co.* v. *FCC,* 541 F.2d 346, 351, 357, n. 7 (3d Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977), involving statutory deference to another federal regulatory agency's interpretation, where the court noted that "[a]n attempt to initiate this proceeding in the district court would probably have resulted in a reference to the FCC under the doctrine of primary jurisdiction" because of technical or policy considerations beyond a court's ordinary competence and within the agency's particular field of expertise.

Indeed, due to the Commission's special competence, expertise and the deference accorded the Commission's interpretations in matters subject to its rate authority, even legal questions and matters that do not involve the Commission's rate authority have been referred to the Commission under the doctrine of primary jurisdiction to secure its views in the first instance. *J. M. Huber Corp.* v. *Denman,* 367 F.2d 104, 111-12 (5th Cir. 1966); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.,* 532 F.2d 412, 417 (5th Cir. 1976); *Carter* v. *AT&T Co., supra,* 365 F.2d at 498.

In a recent decision addressing the Commission's primary jurisdiction in connection with the interpretation of indefinite pricing provisions (such as favored nation provisions) in producer sales contracts, the Commission stated that it alone has the "accumulated ex-

perience" to deal with producer contracts "in a variety of settings" under the *Natural Gas Act,* to gauge "the intent of the parties to permit prices to escalate to the highest rates allowed by law" and "to ascertain to the extent possible, what the parties intended to accomplish in the context of the regulatory environment. . . ." *Independent Oil and Gas Association of West Virginia,* Opinion No. 77, March 4, 1980.[13]

In light of the numerous court decisions granting deference to the Commission's interpretations because of its competence and expertise, which, in part, grows out of the Commission's routine address of these matters, the Commission's statement is undoubtedly correct.

C. *This Case Requires the Commission's Expertise and the Uniform Application of Regulatory Policy*

(i) *Commission Expertise and Policy as to Triggering of the Favored Nation Provision*

The principal issue in the lawsuit is whether the payment of market value royalties by Petitioner to the United States under a government lease is a "purchase from another party seller" which "triggered"

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[13] A copy of Opinion No. 77 is included in the appendix to this brief (App. 27a). Opinion No. 77 addressed the issue of contract interpretation under the *Natural Gas Policy Act of 1978 (NGPA),* 15 U.S.C. Sections 3301, *et seq.* The issue of contract authorization to collect higher rates is exactly the same under the *Natural Gas Act* and the *NGPA.* 15 U.S.C. Section 3311(b)(9). See *Order Adopting Final Regulations Amending And Clarifying Regulations Under The Natural Gas Policy Act And The Natural Gas Act,* 44 Fed. Reg. 16895, 16898 (March 20, 1979), in which the Commission held that the standard under each statute is that established by this Court in *Mobile, supra,* and in *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 332 (1956). If the decision of the court below were allowed to stand, there is little doubt that Respondents will seek to collect NGPA rates based on that court's interpretation of Respondents' Rate Schedule.

the Section 8(D) favored nation provision of Respondents' Gas Rate Schedule. The Commission has considered this precise issue on many occasions and has developed criteria that the seller claiming "triggering" of a favored nation clause must satisfy. *Shell Oil Company, et al.,* Opinion No. 382, 29 FPC 498, 499 (1963), *aff'd., Shell Oil Co.* v. *FPC,* 334 F.2d 1002 (3d Cir. 1963):

> "[I]n order for 'triggering' to occur, where (as here) the contract so provides, the producer filing the most-favored-nation rate increase must show that the other producer is the type of seller contemplated and produces in the area indicated in the contract, that the gas being purchased from the other producer is comparable gas, and that the rate being paid for it is 'higher' in fact as well as in appearance. By showing that these and any other conditions precedent (to triggering) exist, the producer filing for the escalated increase shows that his proposed increase has the 'contractual support' or consent of his purchaser; and the increased rate may be accepted for filing. *If he fails to show that these necessary conditions exist, his filing is rejected as a contractually unauthorized, unilateral rate increase.*" [Italics added.]

Additionally the Commission requires that (29 FPC at 504):

> "After establishing what rate is valid under the contract clause for the favored-nation increase, it must be shown that such rate is just and reasonable. In sum, *the validity of his filing is at all times subject to the ultimate determination of the validity of the triggering rate as well as the justness and reasonableness of the increased rate.*" [Italics added.]

See also *West Texas Gathering Co.,* 29 FPC 510 (1962), and *Morris Mizel, et al.,* 30 FPC 1103, 1104 (1963).

In *Atlantic Richfield, supra,* a case virtually identical to the case at bar, the district court held that the interpretation of a favored nation provision in an interstate sales contract should be decided by the Commission. Like the case at bar, *Atlantic Richfield* involved a favored nation provision in a producer sales contract and a suit to collect a retroactive rate increase up to the applicable ceiling rate prescribed by the Commission. The court, referring to the policy set forth in Commission Opinion No. 382 (*Shell Oil, supra*), found the exercise of Commission jurisdiction in this situation to be mandatory. Dismissing the cause of action, the court held (App. 24a):

> "Private consensual arrangements are enforceable [in this area] only by the FPC. . . . Examination of the consequences of enforcement, whether grounded in law or equity, leads to the judgment that the congressional grant to the FPC of exclusive jurisdiction deprives this court of jurisdiction over this claim."

The court, recognizing the need for uniform application of the Commission's policy regarding favored nation provisions as embodied in *Shell Oil, supra,* concluded that the application of this policy was a matter for the Commission to decide and that Commission approval of rates up to the applicable area rate "was not guaranteed" unless the producer met the burden of proof established in *Shell Oil* (App. 23a). Recognition of the Commission's primary jurisdiction to decide the contract triggering issue was viewed by the court as inseparable from the Commission's exclusive rate jurisdiction (App. 23-24a). See *Zachary* v. *FERC, supra.* The rationale of *Atlantic Richfield* applies with equal force to this case.

(ii) *Commission Expertise in the Comparison of the Rate Schedule with the Government Lease*

The analysis and comparison of the two contracts at issue—Respondents' Rate Schedule and the government lease—require a knowledge of regulatory policies and industry practices that are within the special knowledge and expertise of the Commission. The favored nation provision provides for a comparison of the price provisions of the Rate Schedule with the

> "concurrently effective higher price provisions of such subsequent contract; provided that in determining whether a given price is in fact 'higher' than the price provisions of this contract, the inquiry shall not be limited to the actual prices stipulated but due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts, such as point of delivery, basis of measurement, taxes, dehydration, and delivery pressures . . . ."

In the determination of whether the price is, in fact, higher, and, if so, how much higher, the Commission would have to look to all the other provisions of the contract such as point of delivery, payment for extracted products, basis of measurement, taxes, dehydration, and delivery pressures. Additionally, Respondents have styled their claim in state court as a separate claim for "residue gas" and "extracted plant products." The Commission would then have to compare the price in the Rate Schedule for a wet stream of natural gas, *i.e.*, one containing extractable hydrocarbons, with the royalty values for residue gas and for extracted products. Respondents' claim was made by them in the court below in an effort to make the Rate Schedule and lease comparable on that score, since the lease, unlike Respondent's Rate Schedule, involves a royalty payment for residue or dry gas (*i.e.*, gas ex-

clusive of the liquefiable hydrocarbons) and a separate royalty payment for the extracted hydrocarbons.

As has been recognized by the Commission (see Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* in No. 79-1896, October Term, 1980, pp. 5-6), the Rate Schedule provides for the sale at the wellhead of a wet stream of gas, including all the liquefiable hydrocarbons contained therein (and the price established in the contract was fixed by the parties in recognition of that fact) (J.A. 98-99). Only condensate (oil) recovered at the well separator was excluded from the sale of the wet gas (J.A. 100-01) and the contract provided that Arkla could buy the condensate at its option on the terms specified. Respondents nevertheless claimed in the state court that the Rate Schedule provides a separate settlement for the value of the products manufactured from the liquefiable hydrocarbons contained in the gas sold and for the value of the upgraded condensate produced from their gas wells and processed in Petitioner's plant. By these claims, Respondents would unilaterally alter the contract radically. The claim presents a complicated issue of comparison which requires Commission experience and expertise.

The necessity for the exercise of the Commission's special expertise is exemplified by the state courts' decisions on this aspect of the case. Although under the Commission's regulations the same rate applies to sales of dry (residue) gas and to wet gas (gas sold with extractable liquids contained therein)[14] *Permian Basin*

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[14] The rates apply to the natural gas whether wet or dry and there is no provision for a higher rate for wet gas. Producers get the same price for wet gas as for dry gas (see Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* in No. 79-1896, October Term, 1980, p. 5).

Area Rate Case, 390 U.S. 747, 820 (1968); *Mobil Oil Co.* v. *FPC,* 483 F.2d 1238, 1249 (D.C. Cir. 1973); *El Paso Natural Gas Co.,* 29 FPC 1175, 1179-80 (1963), the Louisiana courts have awarded amounts to the Respondents computed on the residue gas royalty value plus an amount for extracted liquids. The result is that the total amount awarded by the courts below is more than double the area rate ceiling applicable to the gas sold with the liquids contained therein, as provided in Respondents' Rate Schedule. The state courts' decisions if allowed to stand would undermine the Commission's rate jurisdiction of producer sales at the wellhead.[15]

D. *The State Courts' Finding that the Favored Nation Provision Was Activated Is Incorrect Because It Is Inconsistent with Controlling Federal Regulatory Law*

Payment of lease royalty to the United States did not activate the favored nation provision, which was conditioned on the "purchase from another party seller," under federal regulatory law which is determinative of the triggering issue. *Northern Natural Gas Co.* v. *State Corp. Commission, supra; United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392, 400 (1965); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95, 103 (1962). The Louisiana courts committed error in failing to recognize the paramount nature of federal regulatory law which controls the interpretation of the contract. *Id.* The court below did recognize that under prevailing state and federal regulatory law, royalty payments are considered as rent and not purchases of gas (J.A. 36):

> "We recognize that the theory of ownership and classification of lease royalty payments as rent as

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[15] This issue is included in Arkla's pending petition for *certiorari* in No. 79-1896, October Term, 1980.

> urged by defendant is in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.,* 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.,* 103 So. 526 (La. 1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.,* 167 La. 801, 120 So. 373 (La. 1929); *Melancon* v. *Texas Company,* 230 La. 593, 89 So.2d 135 (1956); *Mobil Oil Corporation* v. *Federal Power Commission,* 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413 (1972)."

Nevertheless, the court erroneously ignored controlling federal decisions, finding it "inappropriate" to accept the "technical and restrictive" interpretation on the term "purchase from another party seller" (J.A. 36).

(i) *Federal Regulatory Law Is Paramount*

The Commission and the courts have recognized the paramount nature of the *Natural Gas Act* over jurisdictional transactions and that federal regulatory law controls as to such transactions. *Northern Natural Gas Co.* v. *State Corp. Commission, supra; United Gas Improvement Co.* v. *Continental Oil Co., supra; Textile Workers Union* v. *Lincoln Mills, supra; Local 174* v. *Lucas Flour Co., supra.* The displacement of state law by federal regulatory law as to the interpretation of contracts on file as rate schedules regarding the triggering of a rate increase has been recognized in both court and Commission decisions. In *Superior Oil Co.* v. *El Paso Natural Gas Co.,* 377 S.W.2d 691 (Tex. Civ. App. 1964), the court was confronted with a suit for a declaratory judgment seeking an interpretation of two purchase contracts containing favored nation provisions which Superior claimed had been triggered. The court held that the resolution of these matters was "preempted" by the application of federal regulatory law.

In *Lone Star Gas Co.* v. *Howard Corp.,* 556 S.W.2d 372, 375 (Tex. Civ. App. 1977), referring to *Superior Oil Co.,* the court stated:

> "The gas sales contracts of a natural gas company dealing in interstate commerce of gas for resale are controlled by the federal Natural Gas Act, 15 U.S.C.A., Sec. 717, et seq., and are subject to the jurisdiction of and regulation of the Federal Power Commission. *Superior Oil Company* v. *El Paso Natural Gas Company,* 377 S.W.2d 691 (Tex. Civ. App. El Paso 1964, no writ); *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954)."

So, too, in *Appalachian Power Co.* v. *FPC, supra,* it was held that the Commission had "properly treated [state] law as irrelevant to interpretation of the contract" on file as a rate schedule involving a triggering issue. In that case, the Commission had rejected the rate increase on the basis of *Mobile-Sierra, supra.* Responding to an argument that state law should control the interpretation of the rate schedule triggering issue, the Commission determined as follows, 49 FPC 387, 388 (1973):

> "[S]tate law is not relevant to these wholesale rates, which are under the jurisdiction of the Federal Power Commission. ... Since the contracts are for the sale of electric energy at wholesale in interstate commerce, they are subject to the provisions of the Federal Power Act as interpreted by the Courts. APCO's proposal amounts to an allegation that such sales can be regulated by state law, which is not the case. (*Federal Power Commission* v. *Southern California Edison Co.,* 376 U.S. 205 (1964))."

Similar to these cases, this Court has recently rejected application of state law concepts to gas dedication issues under the *Natural Gas Act.* In *California* v.

Southland Royalty Co., 436 U.S. 519, 530-31 (1978), the Court stated:

> "We conclude that the Commission acted within its statutory powers in requiring that respondents obtain permission to abandon interstate service. 'A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.' *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 US 392, 400, 14 L Ed 2d 466, 85 S Ct 1517 (1965). By tying the concept of dedication to local property law, respondents would cripple the authority of the Commission at a time when the need for decisive action is greatest. Guided by *Sunray* [*Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960)], we believe the structure and purposes of the Natural Gas Act require a broader view of the Commission's authority."

Also, the Tenth Circuit ruled in *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 292 (10th Cir. 1978), that "state law concepts of property interests created by oil and gas leases" are inapplicable to a regulatory determination by the Commission as to the jurisdictional rates to be charged by a small producer. More recently, the Fifth Circuit in *Tenneco Oil Co.* v. *FERC*, 580 F.2d 722 (5th Cir. 1978), referred to the Commission the issue of whether certain natural gas lease-sale agreements were sales of gas in interstate commerce under federal regulatory law.

(ii) *Mobil Oil Corp.* v. *FPC Is the Controlling Rule of Federal Regulatory Law*

In *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, 262 (D.C. Cir. 1971), *cert. denied sub nom., Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972), the court held, what is settled federal regulatory law, that a royalty settlement under an ordinary market value oil and gas lease

was not in fact a sale of gas in interstate commerce over which the Commission had rate jurisdiction; and that neither under the common understanding of the words used, industry parlance, economic equivalent or any other foundation, was the royalty settlement a sales transaction. In *Mobil*, the court relied heavily upon this Court's opinion in *Burnet* v. *Harmel,* 287 U.S. 103, 107 (1932):

> "[T]he statute speaks of a 'sale' and these leases would not generally be described as a 'sale' of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill and produce oil and gas, if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing of title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 414, 415, 58 L. ed. 285, 291, 292, 34 S.Ct. 136; see *Von Baumbach* v. *Sargent Land Co.,* 242 U.S. 503, 521, 61 L. ed. 460, 470, 37 S.Ct. 201."

That *Mobil* is the controlling rule of federal regulatory law is demonstrated in the Tenth Circuit's recent decision in *Jicarilla Apache Tribe* v. *FERC, supra.* In that case concerning the appropriate rate to be charged by a small producer, the issue involved a determination of whether the lessor's election under a lease to take its royalty payments in kind rather than in cash was "tantamount to a purchase."

Both the Commission and the court looked to *Mobil* as the controlling federal regulatory rule of law and

not as a decision limited to the scope of the Commission's jurisdiction. The court described the Commission's position as follows, 578 F.2d at 292:

> "In its brief, the FERC argues that its ruling is supported by *Mobil* .... That case held that lessors, royalty owners were not engaged in 'sales' of natural gas merely by accepting royalty payments pursuant to their leases. The FERC argues that this conclusion is correct because the entire ownership of the gas produced under the lease is in the lessee." [Footnote omitted.]

The court also referred to *Mobil* in reaching its conclusion, stating, *Id.*:

> "The conclusion in *Mobil Oil* that royalty owners are not sellers of natural gas was not based on any concept of ownership or title, however See 463 F.2d at 259. The court found, rather, that a royalty owner was not a 'seller' in any commonly understood sense of that term. Our decision that the Tribe is not a purchaser of its royalty gas is based on much the same reasoning."

See also *Morris Mizel, et al., supra,* where the Commission held that a lease (farmout) agreement was not a "purchase" so as to activate a favored nation provision, relying on the meaning commonly attributed to the word "purchase" in the industry. 30 FPC at 1104.

The Louisiana courts erred in not following the controlling federal regulatory law set forth in *Mobil.*

(iii) *The Louisiana Courts' Interpretation of the Favored Nation Provision Is Incorrect for Other Reasons*

The sole ground for the interpretation of the favored nation provision adopted by the Louisiana courts was that the contract should be interpreted broadly so as

to favor the seller (J.A. 37). This interpretation is inconsistent with the dominant price reducing purpose of the *Natural Gas Act. Phillips Petroleum, supra.* This aspect of the decision illustrates another reason why the Commission should determine the meaning and legal effect of contracts for the sale of natural gas subject to the Commission's jurisdiction. This Court determined in *United Gas Improvement Co., supra,* that the dominant price reducing purpose of the *Natural Gas Act* was a proper factor for the Commission to take into account in the regulatory setting under that statute. 381 U.S. at 402. The rationale of the Louisiana courts' interpretation of the contract is diametrically opposite to the purposes of the *Natural Gas Act* and rate regulation.

The decision is also at odds with the plain terms of the agreement itself. A reading of the contract on file as Respondents' Rate Schedule shows that the courts' interpretation of the favored nation provision does not square with the language of the agreement which discloses a careful distinction between a "purchase from another party seller" and a "lease" transaction involving a royalty payment.

Section 11, for example, entitled, "Royalty Settlements," specifically distinguishes between "seller" and royalty owners in that it requires seller to "pay all royalty payments and other production payments, as provided in its leases and assignments thereof, for all production delivered hereunder." In applying this section, it would be impossible to say that any person in his or her capacity as a royalty owner could be considered as a seller. Respondents have never even attempted to reconcile this section with their interpretation of the contract (J.A. 103). The contract is replete with distinctions between "party sellers" and "royalty

owners" [J.A. 87 (preamble); J.A. 88 [Section 1(B)(3)]; J.A. 89 [Sections 2(B) and (C)]; J.A. 103 (Section 12); J.A. 114 (Section IV); J.A. 115 (Sections V and VI); and J.A. 119 (Ex. "A")]. The distinction drawn in the Rate Schedule between a party seller and royalty owner strikes hard at the lower courts' construction of the United States government as a seller under the lease.[16]

III. The Louisiana Courts Erred in Their Determination of the Small Producer Status of Respondents Under the *Natural Gas Act*

The Louisiana courts erred (i) in determining which of the 15 independent producers who are Respondents herein are "small producers," and (ii) in determining that the small producer exemption from certain rate filing requirements removed the cause of action from the Commission's primary and exclusive jurisdiction under the *Natural Gas Act.*

The Louisiana courts wrongfully interpreted the Commission's regulations regarding small producers (18 C.F.R. Section 157.40)[17] as permitting the courts to award a retroactive rate increase in the guise of damages during the period that Respondents were alleged to be small producers. The Commission's primary and exclusive jurisdiction extends to small producers. *Phillips Petroleum Co.* v. *Wisconsin, supra; FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974); *Jicarilla Apache Tribe* v.

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[16] The Louisiana courts' holding that a royalty settlement triggered the favored nation provision in this case was the subject of a critical review in a recent *Louisiana Law Review* note—Martin, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Mineral Rights,* 40 LA.L.REV. 588, 601 (1980). A copy of the article is included in the appendix to this brief (App. 71a).

[17] A copy of 18 C.F.R. Section 157.40 is included in the appendix to this brief (App. 13a).

FERC, supra. Small producers are subject to the Commission's exclusive rate regulation under the *Natural Gas Act. Id.* The Commission recently held in *Arapahoe Production Co.* v. *Panhandle Producing Co.,* "Order Granting Relief," Docket No. CI78-705 (April 13, 1979), as follows: [18]

> "Since this is a matter of the regulation of small producers, under *Ashland Oil & Refining Co.* v. *F.P.C.,* 421 F.2d 17 (6th Cir. 1970) the Commission has the authority to proceed regardless of the existence of the proceeding in the state court."

Similarly, small producer contract disputes fall within the Commission's primary jurisdiction. *Zachary* v. *FERC, supra; Jicarilla Apache Tribe, supra.* As the Fifth Circuit ruled in *Zachary,* because "[t]he primary impact of the Commission's decision [on the issue of contract interpretation] is upon the rate at which [producers] can sell their gas in interstate commerce, [it is] a matter within its jurisdiction." 621 F.2d at 158. In its *Amendment and Clarification of the Commission's Interim Regulations Implementing the Natural Gas Policy Act of 1978 and Regulations under the Natural Gas Act; Order on Rehearing of Order No. 23-B,* 44 Fed. Reg. 48174, 48175 (August 17, 1979), the Commission held that:

> "There is no basis for treating small producer contracts differently than other contracts for purposes of determining whether there is a contractual authority to charge and collect a maximum lawful price . . . ." [19]

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[18] A copy is included in the appendix to this brief (App. 63a).

[19] The reference to maximum lawful price is a reference to *NGPA* rates. As explained *supra,* at note 13, the issue of contract interpretation is exactly the same under the *Natural Gas Act* and the *NGPA.*

With regard to the issue as to which of the 15 Respondents are small producers and as such need not comply with the rate-change filing requirements of Section 4(d) of the *Natural Gas Act,* the Louisiana courts erred in determining that those Respondents who do not hold small producer certificates issued by the Commission are nonetheless entitled to exemption status. The Louisiana District Court stated the proposition as follows (J.A. 18-19):

> "Four of the [Respondents], herein, Frank J. Hall, [Mrs.] Virgil J. Hall,[20] James A. Noe and S. G. Myers received Small Producers Certificates effective October, 1972 . . . ."

One other Respondent, W. E. Hall, Jr., received a small producer certificate effective October, 1972 (J.A. 186). None of the other 10 Respondents has been issued a small producer certificate by the Commission (J.A. 186). Nevertheless, the Louisiana courts extended to the other 10 Respondents the benefits of small producer status. This determination is inconsistent with this Court's decision in *Texaco, supra,* and is based upon an incorrect and impermissible interpretation of the Commission's small producer regulations. Respondents cannot be accorded small producer status without having been found to be qualifying producers under the small producer regulations. Permitting producers to collect higher rates when they have not qualified for higher rates under the Commission's small producer regulations or otherwise complied with the *Natural Gas Act* rate regulation is inconsistent with *Texaco, supra.*

The Commission's small producer regulations provide for the issuance of a certificate to qualifying producers of natural gas. A small producer is generally de-

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[20] Mrs. Virgil J. Hall is also known as Mrs. W. E. Hall, Sr.

fined as an independent producer whose sales of natural gas, together with affiliated producing interests, do not exceed a specified production quantity during the calendar year. Having applied for and obtained a small producer certificate, the producer is not required to comply with the filing requirements of Section 4(d) of the *Natural Gas Act*. The exemption from the rate-change filing requirements applies only to "small producer sales."

While the Louisiana District Court's determination of the small producer issue was based on its own interpretation of the Commission's regulation (J.A. 18-19), on appeal the Louisiana Court of Appeal affirmed the lower court, apparently relying in part on a Commission order in Docket No. RI76-28 (J.A. 40). The Louisiana Court of Appeal held that "[s]everal of the [Respondents] obtained certificates as small producers in October 1972, and the certificates issued to those parties were made effective to all [Respondents] in this action by order of the FPC" (J.A. 40). The Commission's order is pending review by the United States Court of Appeals for the District of Columbia Circuit in *Arkansas Louisiana Gas Co.* v. *FERC*, Nos. 77-1146 and 79-2068.[21]

As Petitioner has argued before the D.C. Circuit Court of Appeals, the Commission's order regarding the small producer status of Respondents violates its own regulations and contravenes the holding of *Texaco, supra*. The Commission's order unfortunately is not a model of clarity (J.A. 185-87). It can be read either as a ruling that (i) each of the 15 Respondents is a small producer because they are listed in an exhibit

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[21] Petitioner and the Commission have agreed to hold the D.C. Circuit Court of Appeals review proceeding in abeyance pending decision in this case.

to the certificate applications filed by the 5 Respondents to whom certificates were issued, or that (ii) only 5 Respondents are small producers but that the other 10 Respondents are exempt from the filing requirements because their sales are "small producer sales" under 18 C.F.R. Section 157.40(a)(3).

A determination that the 10 Respondents who do not have small producer certificates were certificated because they were included in a list in an exhibit to the application flies in the face of the regulations which limit the exemption to "small producers certificated hereunder." 18 C.F.R. Section 157.40(c). The applications filed by the 5 Respondents holding certificates provided the information regarding qualifications required of small producer applicants only for them (J.A. 185-87). Since the information regarding qualification as a small producer is required under the regulations and because meeting the qualifications is a prerequisite to certification, the 10 Respondents for whom no such information was supplied could not have been issued certificates as co-applicants. Cf. *Highland Resources, Inc.* v. *FPC,* 537 F.2d 1336 (5th Cir. 1976).

As for the other basis for holding that the Respondents who do not have small producer certificates are exempt from rate increase filing requirements, namely, that their sales qualify as "small producer sales" under 18 C.F.R. Section 157.40(a)(3), that holding would also be erroneous. There are three categories of small producer sales in 18 C.F.R. Section 157.40(a)(3). The non-certificated Respondents do not qualify for two of them because those categories apply only to producers who have applied for and received small producer cer-

tificates. The remaining category, 18 C.F.R. Section 157.40(a)(3)(ii), applies to sales made "under a small producer contract" if the producers not qualifying as small producers have interests which in the aggregate are "no greater than 12½ percent."

Since the 10 Respondents who have not obtained small producer certificates are producers whose interests in the aggregate are greater than 12½ percent (J.A. 185-87; R. Ex. P-322A-H), and their sales are not made "under a small producer contract"[22] as required by the regulations, these Respondents cannot obtain the benefits of small producer status and are not exempt from the rate increase filing requirements of the *Natural Gas Act.*

To hold, as the Louisiana courts have held, and the Commission determined in its ambiguous ruling, that the other 10 Respondents possess a small producer exemption, contravenes *Texaco, supra,* wherein it was held that reduced regulation of small producers would be permissible if it were effectively controlled by the Commission. If the Louisiana court's decision that the favored nation provision was triggered by the royalty payments and Respondents are entitled to increased rates is upheld, the 10 Respondents who have not qualified as small producers would collect higher rates set by the court below without a proper regulatory determination that they are entitled to collect such higher rates.

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[22] The contract is a large producer contract, D. B. McConnell Rate Schedule No. 4 (R. Ex. D-22).

VII. CONCLUSION

For each and all of the foregoing reasons the judgment of the court below should be reversed and the court below directed to order dismissal of Respondents' amended petition.

Respectfully submitted,

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March 5, 1981

APPENDIX

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

CONTENTS: Page

NATURAL GAS ACT

United States Code, Title 15

§ 717c. Rates and Charges: Schedules: Suspension of New Rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any

amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

§ 717d. Fixing Rates and Charges; Determination of Cost of Production or Transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are

unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

June 21, 1938, c. 556, § 5, 52 Stat. 823.

Federal Power Commission Regulations Under The Natural Gas Act, Code of Federal Regulations, Title 18

§ 154.92 Filing of Rate Schedules By Independent Producer.

(a) Every independent producer who on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, filed with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who subsequent to the effective date of this part, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this section file a state-

chaser, and (4) the geographical location (field, county, and State) at which delivery is made.

(d)(1) Every independent producer seeking authority to render natural gas service previously authorized by the Commission, as successor in interest in all the properties or other rights covered by a particular rate schedule, shall file three copies of the instrument of assignment whereby the assignee acquired the properties (or rights therein) involved, along with a request that the assignor's rate schedule be redesignated as the rate schedule of the assignee. He shall also file three copies of an informational summary, in the form prescribed in § 250.8 of this chapter, for each contract of sale or transportation of gas involved in the assignment.

(2) Where the authority being sought under subparagraph (1) of this paragraph relates only to an assigned portion of the rights covered by the rate schedule of the assignor, the assignee shall file, as his rate schedule, three copies of the assignor's basic contract of sale, as amended, and of the instrument of assignment together with the informational summary required by subparagraph (1) of this paragraph.

(3) If the rate schedule of the assignor relating to the rights assigned is in effect subject to refund or if the sale is being made by the assignor under temporary authorization subject to a rate refund condition, authority to render service will be granted to the assignee only upon condition that he file assurance by way of bond or undertaking that he will refund, at such times and in such amounts to such persons as the Commission may find to be entitled thereto any portion of the rate which had been permitted to become effective pursuant to § 154.102 or the rate condition in the assignor's temporary authorization as may be found by the Commission not to be justified. Assignee's obligation to refund, in the absence of his voluntary assumption of some greater proportion of assignor's liability, shall attach as of

the effective date of the Commission's order granting the assignee a certificate or temporary certificate as the base may be unless otherwise ordered or provided.

(e) Any jurisdictional natural gas company that maintains a rate schedule on file with the Commission or makes application to have a rate schedule approved by this Commission or modifies any existing or proposed rate schedule must, in addition to the requirements of this or any other section, complete and submit Form No. 108, or applicable schedules thereof, pursuant to the direction of § 260.6 of this chapter.

[Order 174-B, 19 F.R. 8808, Dec. 23, 1954, as amended by Order 278, 29 F.R. 3699, Mar. 25, 1964; Order 556, 41 F.R. 52443, Nov. 30, 1976]

§ 154.93 Rate Schedule Defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided,* That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date;

(b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further,* That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 232, 26 F.R. 1983, Mar. 8, 1961; Order 232-A, 26 F.R. 2850, Apr. 6, 1961; 242 27 F.R. 1356, Feb. 14, 1962; Order 329, 31 F.R. 15485, Dec. 8, 1966]

§ 154.94 Changes In Rate Schedules.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale

subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule not constituting a change in rate level by any means there shall be submitted reasons, nature and basis for the proposed change and the date upon which the change is proposed to be made effective. Changes in service such as compression, dehydration, etc., by either seller or buyer shall be considered as a change in the existing rate level.

(f) *Notice of change in rate level.* (1) An independent producer who has sold in interstate commerce 5,000,000 Mcf of gas or less annually in each year of his operations during the preceding five years and who is proposing a contractual change in rates, charges, etc., shall file the information called for in the following form:

NOTICE OF INDEPENDENT PRODUCER RATE CHANGE FILING

1. Producer

....

(Name)

....

(Address)

2. Buyer

....

(Name)

3. Location of sale ..

....

(Field) (County) (State)

4. (a) FPC gas rate schedule No. ....

(b) Basic contract date ....

5. (a) Type of increase

....

(Periodic, favored-nation, renegotiated, etc.)

(b) Contract basis

....

(Specify Contract Provision)

(c)

....

(Proposed Effective Date)

6. Rates in cents per Mcf at .... psia:
(Specify)

(a) Present effective rate:

Base rate	*Tax Reimbursement*
....	....
Other[1] *(specify separately)*	*Total rate*
....	....

(b) Proposed rate:

Base rate	*Tax Reimbursement*
....	....
Other[1] *(specify separately)*	*Total rate*
....	....

7. Statement of estimated sales volume and comparative revenues for the twelve-month period succeeding the proposed effective date (shown with volume and rates at the same psia as in Item 6):

Estimated volume (Mcf)	*Revenues at present effective rate*
....	....
Revenues at proposed rate	*Difference in revenues*
....	....

8. Average Btu content per cubic foot of the gas sold during the last twelve-month period ......; estimated for the succeeding twelve-month period ....

(Date)	(Signed)
....	....
	(Title)
	....

---

[1] Dehydration, compression, Btu adjustment, etc.

(2) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and who is proposing a contractual change in rate level to a price below or equal to the applicable area price level for increased rates as set out in the Statements of General Policy No. 61-1, as amended (§ 2.56 of this chapter), shall file the information required in subparagraph (1) of this paragraph and may, at his option, submit a statement in support of the proposed change but shall, in any event, submit additional information in explanation of any pertinent circumstance not specifically required by the form.

(3) An independent producer who has sold in interstate commerce more than 5,000,000 Mcf of gas annually in any year during the preceding five years and is proposing a contractual change in rate level to a price higher than the applicable area price level for increased rates set out in the Statement of General Policy No. 61-1, as amended (§ 2.56 of this chapter), and any independent producer (regardless of the quantity of annual sales) proposing an ex parte or unilateral rate change shall file, in addition to the information required by subparagraph (1) of this paragraph, a full statement in support of the proposed change in rate.

(g) A complete copy of all material filed pursuant to this section shall be furnished to each party to the rate schedule. With each such filing there shall be submitted to the Commission a list of the parties to whom such material has been furnished.

[Order 174-B, 19 F.R. 8807, Dec. 23, 1954; as amended by Order 202, 23 F.R. 3715, May 29, 1958; Order 217, 24 F.R. 9469, Nov. 25, 1959; Order 240, 27 F.R. 252, Jan. 10, 1962]

§ 154.95 Oral Agreements.

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

[Order 174-B, 19 F.R. 8809, Dec. 23, 1954, as amended by Order 202, 23 F.R. 3716, May 29, 1958]

* * * * *

§ 157.40 Exemption of Small Producers From Certain Filing Requirements.

(a) *Definitions.* (1) A "Small Producer" is an independent producer of natural gas as defined in § 154.91 of this chapter, who is not affiliated with a natural gas pipeline company and whose total jurisdiction sales on a nationwide basis, together with such sales of "affiliated producers" are not in excess of 10,000,000 Mcf at 14.65 p.s.i.a during any calendar year. As used in this section, the term "jurisdictional sales" includes volumes of gas paid for but not taken under prepayment clauses or otherwise, and volumes of gas sold under other independent producer rate schedules in the proportion that the independent producers seeking to come within this section has an interest in such sales, but does not include sales made pursuant to percentage sales contracts.

(2) "Affiliated producers" are persons who, directly or indirectly, control, or are controlled by, or are under common control with, the applicant producer. Such control exists if the producer has the power to direct or cause the direction of, or as a matter of acual practice does direct, the

management and policies of another producer, whether such power is exercised alone or through one or more intermediary companies, or pursuant to an agreement, and whether such power or practice is established through a majority or minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, associated companies, relationship of blood or marriage, or any other direct or indirect means. For the further purposes of this section, the term "agreement" shall not include any agreement for the operation of a natural gas producing property or a plant processing natural gas or any joint venture, partnership, nominee, or other type of agreement pertaining to the joint exploration for and development and operation of oil and gas properties, unless such agreement otherwise establishes the power of one producer to direct or cause the direction of the management and policy of another producer. Also, for the further purposes of this section, the existence of one or more directors of an applicant producer in common with another producer shall be deemed a conclusive presumption of affiliation and control.

(3) "Small producer sales" are (i) sales by a small producer of his own interests under his own contracts; (ii) sales of all interests under a small producer's contract if producers not qualifying as small producers have interests which in the aggregate are no greater than 12½ percent; and (iii) sales of a small producer's interests under another producer's contract.

(b) *Procedure for securing blanket small producer certificate.* (1) Small producers may apply for a blanket certificate to cover all existing and all future jurisdictional sales that do not raise the producer's total jurisdictional sales on a nationwide basis above 10,000,000 Mcf during any calendar year. Applications by these producers shall include the following information: (i) Total jurisdictional sales on a nationwide basis for the year preceding the ap-

plication; (ii) a list of outstanding certificates and rate schedules together with names and percentage of interest of other interest owners under such rate schedules; (iii) a list of outstanding rate schedules of others in which applicant owns an interest together with applicant's percentage of interest; and (iv) the names of all owners (stockholders, partners, joint venturers, etc.) of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company, and any positions such owners may hold with another natural gas company.

(2) An applicant for a blanket certificate who has no outstanding certificate issued by, or rate schedule filed with, this Commission for the sale of natural gas shall include the following information in his application:

(i) A list of all contracts to sell natural gas in interstate commerce.

(ii) Source of production, total rate and the annual volume delivery obligations of the producer under each such contract, together with names and percentage of interest of other interest owners under each such contract, and

(iii) A list of owners of the applicant with an interest of 10 percent or more, their percentage of ownership in the applicant and in any other natural gas company and any position such owners may hold with another natural gas company.

(3) The application shall contain the information required by the form set out in § 250.10 of this chapter. A conformed copy shall be served upon each of the applicant's purchasers.

(c) *Rate and certificate regulation under blanket certificate.* Small producers certificated hereunder shall be authorized to make small producer sales pursuant to existing and future contracts at the following rate levels:

(1) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 699, et seq., shall be made at a maximum base rate of 130 percent of the applicable base ceiling rate established by the Commission in Opinion No. 699, et seq.

(2) All sales of natural gas by small producers for resale in interstate commerce made in accordance with, and under the provisions of Opinion Nos. 749, et seq., shall be made at a maximum base rate of 35.0¢ per Mcf except as provided for below:

(i) For gas produced in the Permian Basin Area, as defined by Opinion Nos. 662 and 662-A, and sold pursuant to contracts dated on or after October 1, 1968, small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf.

(ii) For gas produced in the Rocky Mountain Area, as defined in Section 154.109(b) of the Commission's Regulations and Opinion No. 699, et seq., small producers shall be entitled to collect a maximum base rate of 40.5¢ per Mcf. The above rates are subject to any adjustments permitted or required under the particular order of general applicability involved. Such rate may be charged and received by the small producer and paid by the purchaser, as the lawful, just and reasonable rate approved by the Commission pursuant to sections 4, 5, and 7 of the Act. However, no small producer shall be relieved from compliance with section 7(b) of the Natural Gas Act with respect to any small producer sale regulated hereunder. Rate regulation as prescribed herein shall not apply to any jurisdictional sales made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer. Nothing done hereunder shall be recognized by the Commission as triggering any escalation clause in an existing contract involving a pro-

ducer not covered by a small producer certificate, except as provided in paragraph (f) of this section.

(3) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of 93 cents per Mcf set in Opinion No. 770-A shall be made at a maximum rate of 130% of that ceiling rate.

(4) All sales of natural gas by small producers for resale in interstate commerce that qualify for the base ceiling rate of $1.42 per Mcf set in Opinion No. 770 shall be made at that ceiling rate.

(d) *Duration of the exemption.* The exemption authorized hereunder shall remain in effect for each small producer until the Commission on its own motion or on application terminates such certificate because the producer no longer qualifies as a small producer or fails to comply with the terms of the exemption. Upon such termination the producer will be required to file separate certificate applications and individual rate schedules for future sales but the exemption will still be effective as to those made under contracts dated prior to such termination.

(e) [Reserved]

(f) *Filings by large producers with respect to related resales.* A large producer may file for the price specified in its related contract for the resale of any natural gas sold to it by a small producer pursuant to the exemption authorized hereunder. In determining whether to accept or suspend such a filing, we shall be guided by the rate level sought and the size of the differential between the purchase and resale price. A large producer under an area rate clause in its resale contract may file for the rate paid by it for gas purchased from a small producer as long as the rate does not exceed the just and reasonable rate prescribed in paragraph (c) of this section.

(g) *Filing of contracts and notification of abandonment.* Pipeline purchasers and large producer purchasers shall

file, within 60 days of the execution thereof, each new contract and each contract amendment dated on or after March 18, 1971, for the sale of natural gas to them by a small producer pursuant to the exemption authorized hereunder, together with an estimate of the purchase volumes and the rate to be charged for the first full year after the commencement of deliveries with respect to each new contract and each contract amendment dedicating additional natural gas, and shall notify this Commission of the cessation of deliveries made by a small producer pursuant to the exemption authorized hereunder within 60 days of such cessation.

(h) *Resale authorization for large producer.* A large producer who has filed on or after July 15, 1971, an application for a certificate of public convenience and necessity for the resale of natural gas purchased from a small producer authorized to sell such gas pursuant to the blanket certificate provisions in paragraph (c) of this section may resell such gas at any time after the filing of its certificate application pending final Commission action thereon. Any amounts collected by a large producer for resales made pursuant to this paragraph in excess of the rate finally determined to be required by the public convenience and necessity for such resales shall be subject to refund with interest at 7 percent per annum.

[Order 428, 36 F.R. 5601, Mar. 25, 1971, as amended by Order 428B, 36 F.R. 13384, July 21, 1971; Order 428-C, 37 F.R. 7591, Apr. 18, 1972; Order 428-E, 39 F.R. 26631, July 22, 1974; Opinion No. 742, 40 F.R. 41772, Sept. 9, 1975; Order 553, 41 F.R. 32213, Aug. 2, 1976; Order 553-A, 41 F.R. 40100, Sept 17, 1976; 41 F.R. 50242, Nov. 15, 1976; 41 F.R. 56792, Dec. 30, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-76-1548-G

ATLANTIC RICHFIELD COMPANY, *Plaintiff*,

v.

NORTHERN NATURAL GAS COMPANY, *Defendant*.
[Filed December 5, 1977 by Joseph McElroy, Jr., Clerk]

MEMORANDUM OPINION AND ORDER

The Parties and the Dispute

Atlantic Richfield Company (Arco) asserts a breach by defendant Northern Natural Gas Company (Northern) of a "Gas Purchase Contract" (contract). There is complete diversity of citizenship and jurisdiction under Title 28 § 1332 is not contested.

The contract was executed in 1955 by Arco's and Northern's respective predecessors in interest. By its terms, Arco sells and Northern buys gas from the "Pecos Acreage." This is a dispute over the price Northern paid for gas purchased under the contract.

Article IV, Section 3 of the contract provides:

> "If the cost per Mcf of gas purchased by Permian from any gas producer in the fields or producing horizons, that Seller is selling gas to Permian hereunder from, shall be greater than the cost per Mcf of gas purchased hereunder, Permian *will increase the price per Mcf payable to Seller* for gas delivered hereunder, currently as deliveries are made, and only

> during periods in which Permian is paying such greater cost to such other producer, by an amount equal to the differences between the highest cost per Mcf paid at the time by Permian to any such gas producer and the cost per Mcf payable hereunder." (underlining supplied)

On August 7, 1973 the Federal Power Commission (FPC) established a "just and reasonable" rate for Permian Basin gas. See FPC Op. 662 August 7, 1973. On September 16, 1973 the FPC granted Phillips Petroleum Company's request for a rate increase to the newly approved level. Thereafter until April 26, 1975, Northern purchased Permian Basin gas from Phillips at the higher rate. This rate was higher than the contract rate Northern paid Arco, so Arco seeks here the difference between the amount Northern paid to Phillips and the amount Northern paid to Arco for the time period September 26, 1973 to April 26, 1975.

Northern has moved to dismiss or, alternatively, to stay upon several grounds. First, Northern argues that because the contract calls for "a sale in interstate commerce of natural gas for resale," the contract is subject to the Natural Gas Act (52 Stat. 821, as amended; 15 USCA § 717 et seq.). Northern argues that the suit would require judicial determination of what are just and reasonable rates, and that this would violate congress' grant to the FPC of exclusive jurisdiction to so determine. Second, Northern argues that Arco never requested or obtained FPC approval for an increase to the "Phillips" price; that such approval was a condition predecent to its obligations under the "favored nation" clause of the contract. Third, Northern argues that the determination of whether the favored nation clause was "triggered" by its payments to Phillips is determinable only by the FPC.

Finally, overlapping its other arguments, Northern argues that Arco has failed to exhaust its administrative remedies by first seeking relief from the FPC.

To draw the issues more finely, certain primer rules of this area of the law must be kept to mind:

(1) Congress did not grant to the FPC the authority to grant reparations. See *Montana-Dakota* v. *Pub. Serv. Co.*, 341 U.S. 246, 258 (1951):

> ". . . we think it clear that Congress did not intend either court or Commission to have the power to award reparation on the ground that a properly filed rate or charge has in fact been unreasonably high or low." *Id.*, p. 258.

See also *Socony Mobil Oil Company* v. *Brooklyn Union Gas Co.*, 299 F.2d 692, 694 (5th Cir.) cert. den. 321 U.S. 817 (1962) and *McLeron* v. *El Paso Natural Gas Company*, 357 F.Supp. 329 (S.D. Tex. 1972). Since the FPC has no authority to award money damages for a contract breach it follows that regardless of the characterization of Arco's claim, the FPC could not grant the requested relief.

(2) Arco is a "natural-gas company" under the Natural Gas Act. Section 154.92 of the FPC regulations, issued pursuant to the authority conferred by Section 4(c) of the Act, requires every "independent producer" (including area) to file with the FPC its "rate schedule" defined by Section 154.93 to be

> ". . . the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing . . . the rates and charges . . . applicable to the . . . sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission. . . ."

Section 4(d) of the Natural Gas Act requires that:

> "(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge . . . or in any . . . contract relating thereto, except after thirty days notice to the Commission and to the public. . . ."

Thus, Arco could not lawfully raise its rates to Northern without FPC approval.

Resolution of the Dispute

The courts do not have jurisdiction to determine a "just and reasonable" rate for the sale of this gas. That jurisdictional anemia cannot be avoided by changing the label of "just and reasonable" to damages for breach of contract. Only the FPC can determine the price paid for this gas. Both judicial and private price determination are thus foreclosed.

Arco argues that this court can entertain this claim for recovery of the difference in value between what Arco was promised by Northern and what it received. The underlying premise of the argument is that the difference between Arco's claim and claims commited exclusively to the FPC are consonant with the objectives of the Natural Gas Act. Arco argues that any opportunity to seek the FPC's approval was foreclosed by Northern's failure to notify Arco that it was paying a higher rate, a failure which Arco contends breached an obligation arising by implication from Northern's direct promise to pay a higher rate.

Stating the contention takes one a long way toward its answer. Regardless of the label placed upon its claim, the result Arco seeks is a higher rate from Northern to Arco—without the FPC's approval. That conclusion is not altered by the FPC's area rate determination for the Permian Basin. That approved rate does increase the likelihood that

the FPC, if requested, would have approved a higher rate paid by Northern to Arco, but it does not weaken the conclusion that, stripped of labels, Arco seeks a retroactive increase in rates, judicially promulgated.

It could be argued that recovery of damages for breach of contract would not frustrate any congressionally designed scheme of exclusive FPC control of gas pricing because the recovery for breach of contract would be measured by a rate level already approved by the FPC. Although no determination that the area rate was just and reasonable would have been required, FPC approval was not guaranteed. As stated by the FPC:

> "... in order for 'triggering" to occur, where (as here) the contract so provides, the purchaser filing the most-favored-nation rate increase must show that the other producer is the type of seller contemplated and produces in the area indicated in the contract that the gas being purchased from the other producer is comparable gas, and that the rate being paid for it is 'higher' in fact as well as appearance." FPC op. 382, pp. 1, 2.

Tolerance of this approach would weaken the requirement that FPC approval of a specific price for specific gas be obtained despite FPC approval of area prices. If Arco's argument were accepted, FPC approval of an area price would trigger contractual rights of others, enforceable in the courts, with no resort to the FPC. It becomes obvious that the regulatory body charged with the responsibility and granted the exclusive power to regulate gas prices would effectively be setting off price explosions without knowing where the charges were placed. It is the chain-effects of favored nation clauses that underline their proscription. Otherwise stated, it would be anomalous to simultaneously hold that congress has given the FPC the exclusive power to determine a just and reasonable rate

for gas but the courts may determine the gas to which the rate is applicable. Nor is this result altered by the doctrine of equitable estoppel. Private consensual arrangements are enforceable here only by the FPC. The result is not altered because the underlying obligation sought to be enforced is equitable estoppel rather than a direct covenant. Examination of the consequences of enforcement of the private arrangement, whether grounded in law or equity, leads to the judgment that the congressional grant to the FPC of exclusive jurisdiction deprives this court of jurisdiction over this claim.

For the reasons stated, Northern's Motion to Dismiss must be granted.

SIGNED and ENTERED this 1st day of December, 1977.

/s/ PATRICK E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-76-1548-G

ATLANTIC RICHFIELD COMPANY

v.

NORTHERN NATURAL GAS COMPANY
[Filed December 5, 1977 by Joseph McElroy, Jr., Clerk]

Judgment

For the reason stated in the court's order of this date, defendant's Motion to Dismiss for lack of subject matter jurisdiction is granted.

SIGNED and ENTERED this 1st day of December, 1977.

/s/ PATRICK E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau, Clerk

December 5, 1979

To All Counsel of Record

No. 78-1112—Atlantic Richfield Company v. Northern Natural Gas Company

Dear Counsel:

Please be advised, that the opinion in the above referenced case will be withheld pending outcome of the petition for certiorari filed in the Supreme Court in Hall v. Arkansas-Louisiana Gas, 368 So.2d 984.

Very truly yours,

Gilbert F. Ganucheau, Clerk

By Richard E. Windhorst, Jr.,
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW:mlv

Messrs. James R. Coffee and
Albert D. Hoppe

Messrs. Edward Kliewer, Jr. and
Stephen R. Anderton

Mr. Patrick J. McCarthy

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Opinion No. 77

Docket Nos. RI74-188 and RI75-21

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA

Opinion and Order Reversing Initial Decision, Remanding and Consolidating Proceedings, Initiating Hearings, Establishing Procedures, and Granting Intervention

Issued: March 4, 1980

Producer Rates—Price Escalator Clauses

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Docket Nos. RI74-188 and RI75-21

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA

Opinion No. 77

Opinion and Order Reversing Initial Decision, Remanding and Consolidating Proceedings, Initiating Hearings, Establishing Procedures, and Granting Intervention

(Issued March 4, 1980)

The principal issue in this proceeding is whether certain indefinite price escalator clauses (often referred to as area rate clauses) in two settlement agreements approved in 1976 by the Federal Power Commission (FPC) confer contractual authority to charge and collect the rates prescribed in the Natural Gas Policy Act of 1978 (NGPA).

The Commission has addressed this question in general terms in the Order 23 series.[1] However, this is the first actual case to come before us which presents the issue in the context of specific contractual language. For the reasons discussed below, we reverse the initial decision and remand the proceeding to the presiding administrative law

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[1] See Order No. 23, Docket No. RM79-22 (March 13, 1979); Order on Rehearing of Order No. 23, Docket No. RM79-22 (May 11, 1979); Order No. 23-A, Docket No. RM-79-22 (June 12, 1979); Order No. 23-B, Docket No. RM79-22 (June 21, 1979); Order on Rehearing of Order No. 23-B, Docket No. RM79-22 (Aug. 6, 1979); and Order on Rehearing of Order No. 23-A, Docket No. RM79-22 (Aug. 13, 1979).

judge. The procedures and standards we apply in deciding this case will also be followed in other proceedings involving the question of contractual authorization to collect NGPA rates.

I.

This proceeding originated in 1974, when the Independent Oil and Gas Association of West Virginia (IOGA) filed petitions with the FPC seeking higher rates for its members and other small producers in West Virginia which sell natural gas to four interstate pipelines: Columbia Gas Transmission Corporation (Columbia), Consolidated Gas Supply Corporation (Consolidated), Carnegie Natural Gas Company (Carnegie), and Equitable Gas Company (Equitable).

In Docket No. RI74-188, which involved gas from wells commenced prior to January 1, 1973, IOGA requested rates higher than those provided in the life-of-lease contracts then in effect. After the institution by the FPC of an investigation under Section 5(a) of the Natural Gas Act, settlement discussions ensued which eventually culminated in a settlement agreement approved by the FPC on March 19, 1976. In Docket No. RI75-21, IOGA petitioned for special relief for Appalachian producers from the uniform national rate established in Opinion No. 699. The settlement reached in that proceeding, which applies to gas from wells commenced on or after January 1, 1973, was approved by the FPC on March 22, 1976.[2] Both settlements, in addition to establishing specified rates, provided for annual escalations of one cent per Mcf and for renegotiation of prices in the event of deregulation.[3]

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[2] This settlement was later interpreted by the FPC to permit collection of Opinion No. 770 rates. Order Granting Petition for Declaratory Order, Docket No. RI75-21, February 2, 1977.

[3] The settlement prices in both dockets were subsequently authorized for those small producers in West Virginia which had

Both settlements also contained price escalator clauses authorizing higher rates upon the occurrence of certain events. The issue in this case is whether those events include either Congressional enactment of the NGPA or the Commission's adoption of rules with respect to NGPA rates.[4] The two clauses, which differ from each other in substantial respects, provide as follows (significant terms underlined):

Docket No. RI74-188:

> *Area Ceiling Rate.* Notwithstanding anything to the contrary in this settlement proposal, upon the ***issuance by the Commission, or any successor governmental authority having jurisdiction hereof hereafter, of a valid order establishing a just and reasonable ceiling rate*** which would otherwise be applicable to the gas being sold hereunder if contractual authority existed for obtaining such rate, if such rate is higher than the Adjusted Price as theretofore increased pursuant to Section 4 hereof, then the price to be paid by the Buyers pursuant to the Contract after the effective date of such order for gas sold shall be equal to such ceiling rate.

Docket No. RI75-21:

> *Superseding rates.* Notwithstanding anything to the contrary in this Settlement Proposal, upon the ***issuance by the Commission, or any governmental authority having jurisdiction over the sales covered by this Settlement Proposal, of an order, decision or policy***

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not initially participated in the proceedings. Order Granting Special Relief, Docket Nos. RI74-188 and RI75-21, October 14, 1976.

[4] The need for interpreting the escalator clauses arises from the fact that, under Section 101(b)(9) of the NGPA, a contract price lower than the federal maximum lawful price established in the legislation would continue in effect and not be superseded by the federal ceiling price. See Order 23, mimeo, pp. 12-13.

> *establishing a rate or rates* which would be applicable to the gas being sold hereunder if contractual authority existed for obtaining such rate or rates, if such rate or rates are higher than the lower of the Adjusted Prices as theretofore increased pursuant to Section 3 hereof, then the price to be paid by the Buyers to the Producers for the gas sold to the Buyers pursuant to the Contracts after the Effective Date, as defined herein, for gas sold shall not be less than such rate or rates.

On December 13, 1978, Columbia filed petitions seeking clarification of the FPC orders approving the settlement agreements. Columbia requested confirmation of its view that both area rate clauses authorized collection of NGPA rates. Following a series of motions and other pleadings by various parties, we forwarded the matter to the chief administrative law judge for resolution in accordance with Order 23-B procedures.[5] The Chief ALJ issued an order on July 19, 1979 in which he designated a presiding judge and established procedures for this proceeding, including a determination that, because there were no factual issues in dispute, the legal issues would be summarily disposed of in an initial decision. Consolidated requested reconsideration, asserting that a prehearing conference should be held in order to determine the extent to which it would be necessary to present parol evidence concerning the intent of the parties. By order dated July 26, 1979, the Chief ALJ reaffirmed his prior decision that a hearing would be unnecessary but advised Consolidated that it was not estopped from presenting whatever evidence it believed relevant in the form of written submissions.

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[5] As we explained in our order of July 13, 1979, the pleadings which had been filed by Equitable and Consolidated contesting Columbia's interpretations were treated as protests within the meaning of Order 23-B.

II.

On August 10, 1979, the presiding judge issued an initial decision in which he concluded that neither clause authorizes the collection of NGPA rates. His conclusion rests upon the following determinations:

(1) Since the pertinent contractual language is not ambiguous, it is unnecessary to consider extrinsic evidence bearing on the intent of the parties. Moreover, because the question is solely one of law, no oral hearing is required.

(2) Under the Administrative Procedure Act, as well as in common parlance, the term "order" refers to agency action and can not be construed as encompassing an Act of Congress.

(3) Similarly, Congress does not act through the "issuance" of a "decision" or "policy"; these terms also relate only to agency action.

(4) Hence, even if, as suggested in Order 23, Congress could be viewed as a "successor" to the Commission for ratemaking purposes, the phrase "successor governmental authority" as used in the Docket No. RI74-188 clause can not be interpreted as referring to Congress because that body does not perform its ratemaking function by "issuing orders".

(5) The absence of the term "successor" in the Docket No. RI75-21 clause does not indicate that Congress was intended to be included. More likely than not, the elimination of the term was based on the parties' desire to include other federal or state agencies which might have regulatory jurisdiction at some time in the future without being successors to the FPC.

(6) Neither clause covers Commission action because the Commission did not "establish" the NGPA rates. The Commission's role is ministerial; it merely implements the rates established by Congress.

(7) The parties and the Commission may not, as a matter of law, read into the settlements terms which are not there.

III.

The various parties to this proceeding[6] express widely divergent views concerning the initial decision and the proper interpretation of the area rate clauses at issue. There are three fundamentally different positions with respect to the legal effect of the two clauses.[7]

IOGA, several producer-intervenors, and Columbia seek reversal of the initial decision in its entirety. They interpret the terms of both settlements as clearly authorizing collection of NGPA prices. They also assert that the parties intended that result and argue that the presiding judge, in failing to consider such intent, did not comply with Order 23. At the other extreme, Equitable, Carnegie, Associated Gas Distributors, the Public Service Commission of the State of New York, and customer-intervenors support the judge's conclusion that neither settlement permits NGPA rates to be charged. These parties also rely on the specific terms of the agreements to support their position. Moreover, they contend that the clauses were intended to permit escalation only to rates which were cost-based and which were fixed at the conclusion of a regulatory proceeding in which all affected persons had an opportunity to participate. They claim that NGPA rates are incentive, not cost-based, prices.

An intermediate position is advanced by the staff and Consolidated, which distinguish between the two settle-

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[6] Subsequent to the issuance of the initial decision, we received a number of petitions for leave to intervene and to file briefs out of time. These requests will be granted.

[7] Six positions were taken before the presiding judge, but certain parties have now modified their views.

ments. It is their view that the first settlement authorizes collection of only Section 104 inflation adjustment prices, whereas the second settlement permits all NGPA rates to be charged. The staff bases its conclusion on the fact that the phrase "just and reasonable" appears in the former clause but not in the latter. Although Section 601(b)(1)(A) of the NGPA provides that NGPA rates are deemed just and reasonable, the staff asserts that the phrase must be construed in the context of the Natural Gas Act, which was the governing statute at the time the settlements were entered into, and as so construed it reflects an intent to be limited to cost-based rates. The staff also argues that Section 104 prices are cost-based and are therefore within the scope of the phrase "just and reasonable" as used in the area rate clause in the Docket No. RI74-188 settlement agreement.

IV.

Although this is the first proceeding in which the Commission has been called upon to decide whether specific area rate clauses authorize the collection of NGPA rates, we recently had occasion to deal rather extensively with the general issue in the Order 23 series. We expressed in those orders certain views concerning the interpretation of area rate clauses which are highly relevant to the resolution of this proceeding. However, before proceeding to a decision in this case, we think it is appropriate to articulate in somewhat greater detail the principles which we will apply in resolving the question before us.

The fundamental concept underlying Order 23 is that, in determining whether a particular clause authorizes collection of NGPA rates, the Commission will endeavor to ascertain and give effect to the intent of the parties to the contract. Indeed, this conclusion led us to amend Rule 270.205(a)(2) to make it clear that intent is the controlling

factor with respect to this issue.[8] We also stated that in reaching a decision as to the parties' intent, the Commission can look beyond the contractual language itself and consider circumstances surrounding the execution of the contract.

Our conclusion that the Commission is not limited to the "four corners" of a contract in determining intent was arrived at after thorough consideration of the record developed in the rulemaking proceedings culminating in that order. The written and oral submissions in those proceedings revealed a "substantial level of agreement between most sellers and buyers as to what was generally intended when the area rate clause was executed," namely, that "the intent of the parties in agreeing to an area rate clause was to permit escalation to the highest ceiling price permitted by law."[9] In view of the record developed in the rulemaking proceedings and in light of the accumulated experience of the Commission in dealing with area rate clauses in a variety of settings, there is ample reason to believe that the intent of the parties to permit prices to escalate to the highest rates allowed by law—including statutory rates—may not, in many cases, have been fully reflected in the terms they chose. Since the words they used were a product of the then prevailing regulatory scheme under the Natural Gas Act, we must attempt to ascertain, to the extent possible, what the parties intended to accomplish in the context of that regulatory environment and to give effect to that intent in light of the changed circumstances brought

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[8] As amended, the rule provides:

> A contractual provision described in § 154.93 (b-1) (relating to area rate clauses), or similar provision, generally will be considered to constitute contractual authorization to charge and collect an NGPA rate to *the extent the parties intended to authorize charging and collection of one or more NGPA rates under the contract*. (emphasis added)

[9] Order 23, mimeo, pp. 37-38.

about by enactment of the NGPA.[10] And we are persuaded that, in many instances, the terminology employed in area rate clauses lacks the clarity which would properly warrant exclusion of extrinsic materials relevant to the question of intent.

For example, the parties may have provided in their contract for escalation to a "just and reasonable" rate. That phrase, standing alone, is subject to conflicting interpretations. It may have been used to express an intent to permit collection of the maximum legally permissible prices, since such prices were required to be just and reasonable under the governing statute then in effect and since only rates meeting that standard could be assured of being passed through by the purchaser to its customers. If that was what the parties contemplated, we do not believe their intent should be thwarted merely because they failed to foresee that the Congress would assume the ratemaking function previously delegated to the Commission and thus expressed their intent in the terminology of the Natural Gas Act. On the other hand, the parties may have referred to "just and reasonable" rates in contemplation of the methodology and procedures which have traditionally been utilized in establishing rates under the Natural Gas Act. The long-standing practice of the FPC and of this Commission has been to set those rates under a cost-based methodology and in the context of an agency proceeding in which affected parties have been afforded the opportunity to participate. If the parties to a contract meant to incorporate these traditional regulatory features into their agreement, it would be inconsistent with their intent to find that the contract authorized collection of all NGPA rates.

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[10] See *Mitchell Energy Corporation* v. *F.P.C.*, 519 F.2d 36, 41 (5th Cir. 1975), where the court said that it "must interpret the terms of the agreement of the parties as they must have understood them at the time they entered into it within the framework of the Natural Gas Act."

Under the circumstances, we conclude that unless a contract specifically includes or excludes statutory rates, it is appropriate to provide an opportunity to the parties to the contract to offer extrinsic evidence of intent.[11] In our judgment, any contract which is less than explicit about the status of statutory rates must be viewed as containing an element of ambiguity which, even under the traditional "plain meaning" rule of contract interpretation, opens the door to consideration of reliable and probative extrinsic materials bearing on the issue of intent.[12] The exclusion of such evidence would, in many cases, lead to a result which would be inconsistent with the expectations of the parties. We decline to follow that path.

The Commission will, in the first instance, look to the written expression of the intent of the parties embodied in the contract itself. Where we find, however, that the document is not free from ambiguity, we will also rely, in resolving the ambiguity, upon the following:

(1) reliable and probative extrinsic evidence of the parties' intent;

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[11] The circumstances and standards under which such an opportunity will be provided are specified below.

[12] See, for example, *Sam Rayburn Dam Electric Cooperative* v. *F.P.C.*, 515 F.2d 998, 1003 (D.C. Cir. 1975). In *Western Union Telegraph Company* v. *Federal Communications Commission*, 541 F.2d 346 (3rd Cir. 1976), the court sustained the FCC's consideration of affidavits concerning the parties' intentions in the execution of a contract. The court relied on Section 556(d) of the Administrative Procedure Act, which provides: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." The court said: "The paramount issue being the real intention of the parties, . . . and the Commission having obviously concluded that an affidavit speaking to that issue was not 'irrelevant, immaterial, or unduly repetitious,' we are not in a position to gainsay that conclusion." 541 F.2d at 353. We caution parties to these proceedings, however, that the Commission will not necessarily admit addfidavits as a matter of course in these cases. See page 16, n. 21, *infra*.

(2) where the parties to the contract are in agreement, the intent which they ascribe to their area rate clause; and

(3) where the above factors are absent or inconclusive, the text of the clause as interpreted in accordance with the standards set forth below.

The relative weight which each of the above-enumerated elements will be given in a particular case will vary with the context in which a question arises. There are three discrete types of cases which we will now proceed to discuss:

(1) The parties agree on an interpretation and no third party (including Commission staff) contests it.

(2) The parties can not agree on an interpretation of the area rate clause.

(3) The parties agree but their mutual interpretation is disputed by a third party.

In the first case, we reaffirm the view expressed in Order 23 that, even where a contract does not expressly provide for the collection of statutory rates, we will generally give effect to the intent ascribed by the parties to their contractual language and permit them to rely on the area rate clause as authority for the collection of NGPA rates. Absent language in the contract which would constitute a specific exclusion of legislatively established rates, we will assume that the statements of the parties as to their intent are accurate and truthful and will accord dispositive effect to the mutual interpretation of the parties.[13]

However, if the parties themselves can not agree on the interpretation of an area rate clause, the Commission obviously can not be guided by either of their conflicting

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[13] However, an opportunity to rebut this presumption will be provided if a protest submitted by a third party or the staff contains reliable and probative evidence contradicting the parties' mutual interpretation. See page 16, *infra*.

statements of intent. In such cases, the Commission must itself construe the contract. The starting point for analysis is the text of the contract. If the price escalator clause expressly permits collection of statutory or legislatively established rates, the Commission will, of course, permit sellers to charge and collect NGPA rates. Where, however, there is no such explicit reference, the Commission will allow the parties to make an offer of proof as to intent. If an offer of proof is made, the Chief ALJ (or the presiding judge, if one has been designated) will then determine how to proceed further. The judge will evaluate the offer and determine whether an evidentiary hearing should be held. If he concludes that the evidence offered would not be reliable and probative of the parties' intent, he should reject the offer and issue an initial decision by summary disposition in accordance with the interpretive standards discussed below. Likewise, if a hearing is held, only evidence determined by the judge to be reliable and probative should be admitted.

In those cases where there is no reliable and probative evidence of intent or where such evidence is inconclusive, the Commission will ascertain the intent of the parties on the basis of the text of the clause in dispute. In such situations, we will *generally* conclude that a contract containing an area or national rate clause does not authorize collection of all NGPA rates if it contains the following disqualifying terms:

(1) It refers to rates established or prescribed by an administrative body;

(2) It couples the reference to administrative action with a reference to the Natural Gas Act or the "just and reasonable" standard of that Act; and

(3) It contains no additional language which has the effect of uncoupling the link between agency action and the statutory standard of the Natural Gas Act.

If all of the above three factors are present, the Commission will interpret the contract to authorize collection of only those NGPA rates which are cost-based, namely, those provided in Sections 104 and 106(a). If these disqualifying terms are not *all* present, we would generally find that an area or national rate clause authorizes NGPA rates. Let us explain.

Where a reference to administrative action is not coupled with a reference to the Natural Gas Act or the statutory standard under that Act, the Commission will generally find that all of the NGPA rates are authorized by the price escalator clause. A contractual provision with no reference to a particular ratemaking standard would generally indicate an intent to permit prices to rise to the highest prices permitted by law. The fact that a contract refers to rates established by the Commission or by a "valid order" does not, in and of itself, signify that the parties intended to exclude rates imposed by legislative action. The Commission's ratemaking power under the Natural Gas Act was delegated to it by the Congress.[14] We will not assume, in the absence of specific language or reliable and probative evidence, that the parties intended to be bound by an agency determination but not by a mandate emanating from the source of that agency's authority. Hence, we decline to conclude that the mere transfer of the ratemaking function from the Commission to the Congress—most likely unforeseen by the parties at the time the contract was executed—should operate to defeat the intent of the parties simply because they expressed that intent in terminology which was based on the regulatory scheme then in force.[15]

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[14] See Order 23, mimeo, p. 46, n. 44.

[15] Our views on this matter are consistent with positions taken by the courts under analogous circumstances. In *City of Oglesby* v. *F.E.R.C.*, 610 F.2d 897 (D.C. Cir. 1979), the court accepted, without discussion, the contention of the petitioners that in pro-

Similarly, where a contract provides for escalation to "just and reasonable" rates and does not refer to agency action, we will generally conclude that all NGPA rates are contractually authorized.[16] We acknowledge that a reference to the "just and reasonable" standard is subject to differing interpretations.[17] Nevertheless, in those cases

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viding for a rate change "by order of the Illinois Commerce Commission," the parties simply meant to "advert to the command of the appropriate regulatory agency." The agreements had been executed after FPC (later FERC) jurisdiction over wholesale rates had become clear, but the language used was a carryover from earlier agreements. In light of this explanation, the court had no difficulty in substituting the federal agency for the state body referrel to in the contract, and then proceeded to discuss the contested issue before it, namely, whether the contract incorporated the state's regulatory procedures which arguably permit unilateral rate modifications. 610 F.2d at 903.

In Richmond Power & Light v. *F.P.C.*, 481 F.2d 490 (D.C. Cir. 1973), the court followed the same approach where the contract had been entered into prior to FPC jurisdiction over the agreement. The court accepted the FPC's position that the parties intended to be bound by an order of the appropriate regulatory agency, and stated that it had no quarrel in principle with interpreting the contract, in light of changed circumstances, to accomplish what the parties intended. 481 F.2d at 499.

It appears, therefore, that the courts will not invalidate a contractual provision merely on the basis of a transfer of regulatory jurisdiction. Accordingly, even where area rate clauses refer only to Commission or agency action, they should not be rendered inoperative solely because of the assumption by Congress of the ratemaking function.

[16] Such contracts are of the so-called "going rate" type which the FPC permitted in Section 154.93(b-1) of its regulations under the Natural Gas Act, provided that the "going rates" were controlled, were of general applicability, and satisfied certain other conditions. As we said in Order 23 (mimeo, p. 36), the NGPA maximum ceiling prices meet each of the criteria established by the FPC.

[17] As discussed at page 8 above, the parties' utilization of the "just and reasonable" standard is ambiguous; they may have in-

where the written agreement fails to join the reference to the "just and reasonable" standard with a reference to agency action, we think the most reasonable construction of the clause, in the absence of reliable and probative evidence of a contrary intent, is that the parties intended to permit prices to rise to the maximum rates allowed by law.[18]

However, where a contract couples a reference to administrative action with the "just and reasonable" standard of the Natural Gas Act, and there is no additional language which has the effect of uncoupling that link, we will generally conclude, absent reliable and probative evidence showing otherwise, that the parties meant to limit escalation of prices to those which are administratively established and cost-based. In these circumstances, the ambiguity inherent in the adoption of the "just and reasonable"

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tended to limit escalation to administratively established, cost-based rates. Or they may have used the phrase simply because they sought assurance that the prices collected could be passed through and because the highest legally permissible rates were required to conform to the standard of the Natural Gas Act. A different case would be presented, however, where the area rate clause refers to rates established under the Natural Gas Act. Here the parties would seem to have bound themselves to the statutory scheme, one which itself ties the "just and reasonable" standard to agency action pursuant to procedural requirements with an opportunity for judicial review. A clause which references rates under the Natural Gas Act would seem to preclude authorization of NGPA rates unless subsequent language in the contract uncouples the escalator clause from the Natural Gas Act.

[18] This view is most plainly in accord with the weight of submissions by parties to these contracts received in the Order 23 proceedings. See p. 7, *supra*. It is also worth noting here that the NGPA rates are "deemed to be just and reasonable" by the Congress and their passthrough to consumers is specifically authorized and directed unless this Commission finds that the amount paid was excessive due to fraud, abuse, or similar grounds. See Sections 601(b)(1)(A) and 601(c)(2) of the NGPA.

standard is clarified by the use of terminology binding the parties to the determinations of an administrative body. We will therefore resolve that ambiguity by interpreting the area rate clause as incorporating the traditional features of regulatory practice long associated with the establishment of rates under the Natural Gas Act, namely, the use of a cost-based methodology and the opportunity for party participation afforded by an agency proceeding. Accordingly, in such cases the Commission would not find the requisite contractual authority to charge and collect NGPA rates other than the Sections 104 and 106(a) rates.[19]

Where, however, the contract contains additional language which has the effect of dissociating the bond between administrative action and the statutory standard of the Natural Gas Act, we will generally conclude that the contract authorizes collection of all NGPA rates unless reliable and probative evidence demonstrates otherwise. Such an uncoupling could occur, for example, where a reference to the Natural Gas Act or the "just and reasonable" standard is supplemented by the phrase "or successor statutory authority" or words of similar import.

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[19] See the discussion of Section 104 and Section 106(a) rates in Order 23, mimeo, pp. 44-46, where we said that the Section 104 prices are based upon and inextricably linked to previously prescribed FPC rates, and that this is also generally true of the Section 106 price ceilings applicable to rollovers of interstate contracts. As we there explained, these prices were determined by freezing FPC rates as of April 20, 1977 and changing the escalation factors from those established by the FPC to a method which takes inflation into account. Thus, we have cost-based rates which are adjusted to keep them in constant, real April 1977 dollars. Unless the parties in a particular case can demonstrate otherwise by reliable and probative evidence, we do not believe that the mere modification of the escalation factors had the effect of bringing Section 104 and Section 106(a) rates outside the scope of what was generally contemplated by parties who intended to restrict escalation to administratively established, cost-based rates.

In this circumstance, the parties commit their contractual destiny to a change in the statutory scheme and give advance acceptance to the outcome of the legislative process.[20]

We emphasize that while the above interpretive standards constitute, in our judgment, the most reasonable constructions of ambiguous area rate clauses in the absence of other reliable indicia of intent, they are by no means the only reasonable interpretations of such clauses. Thus, for example, contractual language coupling a reference to agency action with a reference to the "just and reasonable" standard would not necessarily be inconsistent with an intent to permit collection of the highest lawful prices. When viewed in the context of the regulatory scheme in effect when the agreement was entered into, such language may well have been employed as a means of expressing an intent to allow the maximum rates permitted by law. Conversely, it would not be unreasonable to interpret a clause which refers to either administrative action or the "just and reasonable" standard without linking the two as authorizing only administratively established, cost-based rates. Accordingly, where the meaning of an ambiguous contract is clarified either by the mutually agreed upon interpretation of the parties themselves or (where the parties can not agree) by reliable and probative extrinsic evidence of the parties' intent, we will rely on those factors in determining the meaning of the clause. In short, the interpretative guidelines set forth above will be applied only where:

(1) the contract does not contain language which would constitute an explicit inclusion or exclusion of statutory rates, and is therefore ambiguous;

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[20] Likewise, if a reference to administrative action is followed by language broad enough to encompass legislative enactments, the clause would appear to indicate that the parties did not intend to be restricted to the outcome of an agency proceeding.

(2) the parties themselves are not in agreement; and

(3) reliable and probative evidence of intent is either absent or inconclusive.

It follows from the foregoing that in the third type of case enumerated above—where the parties agree but their mutual interpretation is contested by a third party—a different standard must be applied from that which pertains when the parties themselves are in disagreement. In contrast to the latter situation, where reliance on the parties' present statements of intent is necessarily precluded by their conflicting positions, we will generally presume that the mutual interpretation of the parties to a contract should be relied upon to resolve any ambiguities in the instrument. The parties to the agreement are in the best position to know what they intended. And where they agree that they contemplated the highest legally permissible rates, their statement is entitled to a presumption of validity even if the language, standing alone, lends itself to an interpretation that they envisioned administratively established, cost-based rates. Accordingly, while we consider it appropriate to afford affected third parties and their representatives the opportunity to challenge the mutual understanding of the parties to the contract, such third parties will necessarily bear a heavy burden in attempting to overcome the presumption of validity to which the interpretation of the direct parties is entitled. We conclude, therefore, that in the case of third-party protests to the collection of NGPA rates which the parties agree is contractually authorized, the Commission will find contractual authorization to collect NGPA rates unless the express terms of the contract exclude rates promulgated by statute or the protest (including any supplemental filing submitted in accordance with Rule 23-B procedures) contains reliable and probative extrinsic evidence which, if true, would specifically contradict the mutual interpretation of the parties

and be dispositive of the case.[21] If the protest contains such evidence or if the express terms of the contract exclude rates promulgated by statute, the Chief ALJ or the presiding judge would establish further proceedings.[22]

We recognize that our approach may lead to differing results in different cases even where the contractual language is identical, depending on whether the dispute involves the parties themselves or third-party protests. For example, where the parties to the contract disagree and there is no reliable and probative evidence of intent, we might interpret a particular clause under the guidelines set forth above as authorizing only Section 104 and Section 106(a) rates, whereas we would find that the same clause authorizes collection of all NGPA rates where the parties agree on that interpretation unless a third party can establish by reliable and probative evidence that the parties intended otherwise.

We see nothing wrong with that. To begin with, since we are dealing with intent, some degree of variation is to be expected; it would be surprising indeed if, in light of the reasonable alternative constructions discussed above, the parties to all contracts containing the same language had an identical intent.[23] Moreover, as previously stated, the

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[21] If such evidence takes the form of affidavits, they must aver specific factual circumstances which, if true, would contradict the parties' construction of the contract.

[22] Further proceedings may be appropriate even where the contractual language specifically excludes rates promulgated by statute and thus does not appear consistent with the parties' interpretation, since they may have engaged in a course of conduct subsequent to execution of the instrument which modified its original terms. See Order 23-B, mimeo, p. 11, n. 14.

[23] See *Arkansas Louisiana Gas Company* v. *Hall,* Docket No. RI76-28 (order issued May 18, 1979), where we pointed out that a uniform interpretation would seem to be impossible where the issue is the intent of the parties to a contract. *Id.* at 8 (mimeo). [footnote continued on page 29a]

interpretative standards which we will apply in the case of disputes between the parties to the contract do not necessarily represent the only reasonable interpretations of area rate clauses; rather, the guidelines are aids to construction where other extrinsic factors are unavailable or unreliable. Where the parties are in agreement, however, their mutual interpretation should be accepted so long as the text of the clause is reasonably susceptible to that interpretation and their position is not contradicted by reliable and probative evidence.

We observe, in this regard, that the body of contract law which has evolved under our legal system was designed essentially to resolve controversies between the parties to an agreement or their successors-in-interest. When, however, the parties reach a mutual understanding, without resort to litigation, as to the proper interpretation of a contractual provision, the construction to which they have agreed is controlling. Furthermore, even where the parties eventually have a parting of the ways and litigation ensues, the courts accord great weight to prior acts or declarations of the parties which are indicative of a previous mutually agreed upon interpretation.[24] It would appear even more

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However, notwithstanding the possible differences in the outcomes of particular cases, the Commission has primary jurisdiction over the issue of contractual authorization to charge NGPA rates under the criteria established in *Arkansas Louisiana, supra*. First, this issue is clearly of great import to our regulatory responsibilities under the NGPA. Furthermore, it is evident from the discussion above that to the extent that the circumstances of different proceedings are similar, the Commission will apply uniform standards and procedures in deciding the question of contractual authorization to charge NGPA rates.

[24] See 4 *Williston on Contracts* § 623 (3rd ed. 1961). In *United States* v. *F. D. Rich Company*, 434 F.2d 855, 859 (9th Cir. 1970), the court, relying on a prior Ninth Circuit decision in *Pekovich* v. *Coughlin*, 258 F.2d 191 (1958), said:

> *Pekovich* is closely in point. There, the court held that the writing was ambiguous and that the trial judge had to con-

appropriate to follow that approach when the parties continue to be in agreement before the decisional forum, and particularly where the interpretation of the parties is consistent with that suggested by a majority of the comments submitted in the Order 23 rulemaking proceeding.[25]

V.

We now turn to the application of the foregoing guidelines to the case before us. Although the Order 23 series applies by its terms to contracts, not settlement agreements, the Commission will apply analogous principles in interpreting the IOGA settlements. These settlements are multiparty rather than bilateral agreements, and the controversy we are called upon to decide involves not only a dispute between the sellers and the purchasers but also a disagreement among the purchasers themselves as to the meaning of the area rate clauses. In these circumstances, the Commission must treat the settlements as a case when the parties can not agree on the meaning of the contract.

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strue the meaning of the writing by recourse to the facts as developed in the evidence. There, as here, the parties agreed on the meaning of the instrument in question. The court went on to say that such being the case, the contract was enforceable as interpreted by the parties themselves.

[25] As we pointed out in Order 23 (mimeo, pp. 13-14), the responsibility of the Commission to determine whether contractual authority exists for collection of NGPA rates is based upon the doctrine announced by the Supreme Court in the *Mobile* and *Sierra* cases, namely, that rate filings inconsistent with contractual obligations are invalid. Those two cases involved disputes between the parties to the applicable contracts, not third-party protests to the collection of rates which the parties agreed were contractually authorized. See *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1950); *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1950).

The presiding judge concluded that neither of the area rate clauses in the two settlements [26] authorizes collection of NGPA rates. He held that the language in both clauses unambiguously refers only to administrative action as the event triggering higher rates; hence, Congressional enactment of the NGPA could not have that effect. He further ruled that since the Commission's function with respect to NGPA rates is ministerial in nature, the Commission did not "establish" those rates within the meaning of the settlement clauses. In addressing IOGA's contention that the parties intended the rate to rise to whatever level sanctioned or enacted by the federal government, the judge responded: "If this was the intent of the parties, though, it was not embodied in the unambiguous word 'order'." [27]

For the presiding judge, the text of the clauses was not only the starting point for analysis, but the end point as well. In this he erred. For the reasons expressed above, the fact that a price escalator clause speaks only of rates established by agency action does not necessarily mean that the parties intended to exclude statutory rates. The judge failed to recognize that an intent to permit escalation to the maximum lawful rates may well have been embodied in terminology that was a product of the then prevailing regulatory setting. The parties should have been provided the opportunity to make offers of proof of reliable and probative evidence of intent unless the area rate clauses were found to contain language which constitutes an explicit exclusion or inclusion of statutory rates. Since we find no such express terms in either of the applicable clauses, the proceedings will be remanded to the presiding judge for the purpose of allowing the parties to make

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[26] These clauses are quoted on page 3, *supra*.

[27] Initial decision at 9.

offers of proof as to intent [28] and for such further proceedings, including a hearing, as he may consider necessary.[29]

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[28] Certain parties argue that further evidentiary proceedings in this case are unnecessary because, if probative evidence of intent existed, it would have been offered by now. This may be true, and if it is, the presiding judge should be able to bring this matter to an expeditious conclusion. But we must take cognizance of the fact that the chief administrative law judge at the outset ruled out an evidentiary hearing because he determined that this case presented only legal issues, and he stated only that Consolidated was "not estopped" from submitting evidence in written form. See page 4, *supra*. On this record, we can not be satisfied that the parties were not dissuaded by the Chief ALJ's procedural orders from availing themselves of the opportunity to present such reliable and probative evidence as they believe may shed light on the intent of the parties. We therefore now provide that opportunity.

[29] We are proceeding in this case, as did the presiding judge, on the assumption that the settlement agreements are the controlling legal instruments with respect to the issue of contractual authorization to collect statutory rates. See initial decision at 6. Carnegie contends, however, that because its contracts with the IOGA producers specifically preclude superseding rates, our construction of the area rate clauses in the settlements would not be applicable to Carnegie in any event. IOGA, on the other hand, regards the settlements to have superseded and modified the applicable contracts. IOGA relies on the provisions in the settlements which required the purchasers to offer to modify all existing contracts so that they would be consistent with the terms of the settlements. The agreement in Docket No. RI75-21 also required all future contracts relating to wells commenced on or after January 1, 1976 to be consistent with the settlement provisions. Since neither Carnegie nor IOGA has explained why the Carnegie contracts apparently did not conform to the area rate clauses in the settlement agreements, Carnegie's assertion should be addressed by the presiding judge on remand.

In those cases where the pipelines and producers did modify their contracts in accordance with the settlements, the texts of the contractual provisions, if not ambiguous, may help to clarify the meaning attached by the parties to the area rate clauses in the settlement agreements. See our discussion at page 18 above concerning the significance accorded to the parties' interpretation of an ambiguous agreement.

Because this proceeding involves settlements rather than contracts, we must address the question raised by the Public Service Commission of the State of New York concerning the privileged status of settlement negotiations. In *Texas Eastern Transmission Corporation,* 48 F.P.C. 1170, 1178-79 (1972), the FPC, in upholding a claim of privilege with respect to settlement negotiations, observed that "[t]o permit a party to settlement procedures to disclose and to attempt to make use of prior positions taken or the details of the settlement process would be very prejudicial to the settlement of proceedings." We agree with the policy established by the FPC in that case. Consequently, if any of the parties which participated in the settlement negotiations in these dockets asserts such a privilege, evidence of the conduct or the statements of the parties made during the course of such negotiations will not be admitted. In that event, the presiding judge may consider only such reliable and probative evidence as would not violate the privilege.

If the presiding judge determines, upon remand, that a hearing is not warranted on the basis of the offers of proof, or if the evidence submitted at a hearing proves to be inconclusive, an initial decision shall be rendered based upon the terms of the settlement agreements in accordance with the interpretive standards adopted in this order. Upon examination of the relevant provisions of the settlements in both dockets, we find that the substantial differences between them require us to reach different conclusions as to the legal effect of each clause.

Unless demonstrated otherwise by extrinsic evidence, the area rate clause in Docket No. RI74-188 (the "old gas" settlement) appears to limit escalation to administratively established, cost-based rates. The clause speaks of the "the issuance by the Commission, or any successor governmental authority . . . of a valid order establishing a just and reasonable ceiling rate. . . ." As a threshold matter, we agree

with the presiding judge that the phrase "valid order" signifies an agency determination.[30] Also, the reference to a "successor governmental authority" must be understood, in the context of this particular clause, to refer to a successor agency rather than Congress.[31] The clause also expressly joins that agency action with the "just and reasonable" standard of the Natural Gas Act, and there is no additional language which uncouples the link established in the text between administrative action and the statutory standard of the Natural Gas Act. Consequently, absent reliable and probative evidence of a contrary intent of the parties, the judge shall find that the old gas settlement clause authorizes collection of only those rates prescribed in Sections 104 and 106(a) of the NGPA.[32]

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[30] We note, however, that one of the grounds for the judge's conclusion—his reliance on the definition of "order" in the Administrative Procedure Act—was erroneous. Since the APA definition (5 U.S.C. § 551(b)) specifically excludes rulemaking, the judge's construction would compel the conclusion that the clause would not be triggered by the establishment of new area or nationwide rates in rulemaking proceedings. Such a result would, in our view, be contrary to the intent of the parties. Indeed, the FPC held in 1977 that the area rate clause in Docket No. RI75-21 authorized collection of the rates established in Opinion No. 770, which, while denominated an order, was the culmination of a rulemaking proceeding. See note 2, *supra*. There is no reason to believe that the result would have been any different if the clause in Docket No. RI75-21 had referred only to "order" rather than to "order, decision, or policy." Therefore, the term "order," as used in Commission practice, is not necessarily restricted to the APA definition.

[31] In Order 23 (mimeo, p. 44, n. 42), we withdrew our previous assertion that Congress could not be considered a "successor" under a "plain meaning" construction of a contract. But that does not mean that "successor" must always be read to include Congress. The term must be interpreted *in the context of the clause as a whole.*

[32] The judge rejected the argument of Consolidated and the staff that the Section 104 inflation adjustment was authorized by

In contrast, the language in Docket No. RI75-21 (the "new gas" settlement), while not crystal clear, suggests that the parties contemplated escalation of prices to whatever levels would be permitted by law. The clause provides for higher rates upon "the issuance by the Commission, or any governmental authority . . . of an order, decision or policy establishing a rate or rates. . . ." Thus, the clause omits the term "successor," expands "order" to include "decision or policy,' and contains no reference to the Natural Gas Act or the statutory standard of that Act. Taken together, these factors point toward an intent to allow prices to rise to the highest legally permissible rates. In this connection, we are unable to accept the conclusion of the presiding judge that "issuance of policy" can not constitute a reference to Congressional action. Indeed, we find that conclusion rather strained. We believe that that phrase is sufficiently broad to encompass a legislative enacement,[33] and that, when read in conjunction with the omission of "successor"[34] and of any reference to a stand-

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the old gas settlement. He stated that "[t]here is no difference between Section 104 and any other section of Title I [of the NGPA], they are all rate provisions established by Congress, not the FERC." Initial decision at 10. We conclude otherwise. See note 19, *supra*.

[33] The Supreme Court has stated that "[t]he essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct." *Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 145 (1941). We do not here hold that "issuance of policy" constitutes an unambiguous reference to the legislative process. If that were so, there would be no need for a remand. We simply reject the notion that the phrase must be construed as a reference to agency action alone.

[34] The judge recognized that it was necessary to reconcile the elimination of "successor" with his conclusion that only agency action was covered. He resolved the problem by accepting the suggestion of the Public Service Commission of the State of New York that "[m]ore likely than not, . . . the word was eliminated in recognition of the possibility that state agencies or federal

ard for establishing rates, the clause in its totality manifests an intent to authorize collection of statutory rates. Accordingly, the presiding judge shall so conclude unless the parties can establish a contrary intent by reliable and probative evidence.

In its brief opposing exceptions, the Public Service Commission of the State of New York (PSCNY) emphasizes that both settlement agreements provide that in the event of deregulation, redeterminations of prices will be based on a cost-based formula. PSCNY appears to suggest, as previously argued by Equitable,[35] that if the producers were willing to accept rates derived through a cost-based formula in the event of total deregulation, they would not have contemplated receiving higher, non-cost-based statutory rates if Congress were to prescribe such rates rather than deregulate.

We do not believe that the deregulation clauses are, on their face, dispositive of the question of the parties' intent with respect to the area rate clauses. For one thing, the area rate clauses contain the introductory language "Notwithstanding anything to the contrary in this settle-

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agencies, while not being successors to the FPC, might at some future point have regulatory jurisdiction." Initial decision at 16. This explanation, apart from its speculative character, is not persuasive on its face. It would require us to conclude, without supporting evidence, that the parties in fact contemplated the possibility of significant legislative action (since only through legislation could the FPC's jurisdiction have been eliminated or transferred to a non-successor agency) and were prepared to tie their destiny to the determination of an agency whose identity, procedures, and ratemaking methodology were unknown, but that they nevertheless declined to be bound by direct Congressional ratemaking. If that was indeed what the parties intended, they will have an opportunity to so demonstrate by reliable and probative evidence.

[35] See Equitable's motion for expedited decision, filed May 8, 1979, pp. 1-2.

ment proposal. . . ." Furthermore, it is possible that the parties regarded a cost-based formula as the only feasible means of restricting price escalations to a reasonable level in an environment of complete deregulation, but that they were fully prepared to accept a different and higher limit imposed by Congress. However, the argument raised by PSCNY and Equitable merits further inquiry, and the parties should have the opportunity to submit reliable and probative evidence bearing on the issue of whether and to what extent the intent of the parties in adopting a cost-based approach in the deregulation clauses bears any relationship to their intent in regard to the area rate clauses. Accordingly, the parties may, on remand, make appropriate offers of proof on that question.

VI.

Another issue which must be resolved in this proceeding is the date from which NGPA prices may be collected. There is a dispute between Consolidated, on the one hand, and IOGA and the staff, on the other, as to whether the producers are entitled, pursuant to the applicable settlement agreements, to collect NGPA rates on a retroactive basis where they have elected not to follow the Commission's procedures for making interim collections subject to refund.

The presiding judge ruled that this issue was moot in light of his conclusion that the settlement agreements do not authorize the collection of NGPA rates. Inasmuch as the Commission's holdings in this order remove the mootness, we will remand the issue to the presiding judge.[38]

[38] On February 12, 1980, IOGA filed a motion for severance and expedition in which it states, among other things, that Equitable and Carnegie are not permitting IOGA producers to make interim collections of NGPA prices pursuant to the Commission's regulations, and requests the Commission to resolve the controversy. Although IOGA does not refer to a previous pleading in

VII.

We have also been asked to determine whether certain alleged actions of Equitable Gas Company in resisting payment of the higher NGPA rates constituted violations of the Natural Gas Act. This matter arose as a result of an Emergency Petition for Declaratory Order, filed on July 6, 1979, in which IOGA made certain charges against Equitable and requested appropriate findings and relief from the Commission. Specifically, Equitable sent a letter to IOGA members in June 1979 threatening to exercise its contractual rights to refuse to purchase gas from them for the period July 9 to November 1 unless they waived their right to collect NGPA prices during this period.[37] IOGA sought a ruling that Equitable could not compel such a waiver; a finding that the shut-ins of wells as a result of Equitable's letter constituted a *de facto* abandonment of service by Equitable in violation of Section 7(b) of the Natural Gas Act; and a finding that Equitable's contract with IOGA members permitting curtailment of deliveries during a six-month period is unjust and unreasonable under Sections 4 and 5 of the Natural Gas Act. The Chief ALJ consolidated for decision IOGA's emergency petition with the instant proceeding.

The presiding judge's rulings on the emergency petition were based primarily on his conclusion that the IOGA producers were not contractually entitled to NGPA rates. Thus, he held that the waiver issue is moot, and that Equitable would not cause any shut-ins or curtail purchases if,

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which it raised this issue, it would be appropriate, in the interest of administrative efficiency, for the presiding judge to permit the parties to file pleadings on this matter and to address it in his initial decision together with the retroactive collection question. Accordingly, we will consolidate the interim collection issue with the instant proceeding and refer it to the judge for initial decision.

[37] Equitable's contract requires it to take gas during the summer months only "if and as needed".

as he had concluded, the producers were limited to existing gas prices.

The staff, however, urges that because the judge's decision on NGPA rates was erroneous, these issues are not moot. The staff also contends that the judge ignored the uncontested fact that ten producers had shut in their wells as a result of Equitable's letter.[38] The staff further believes that Equitable's conduct was violative of the Natural Gas Act even if the Commission ultimately determines that NGPA rates are not authorized by the settlements. IOGA also claims that a hearing is required on the petition regardless of the outcome of the contract dispute.

Equitable vigorously defends its actions on the grounds that it was in an oversupply situation and wishes to prevent its customers from paying more than legally required. It also disputes certain factual allegations made by the staff, including the suggestion that Equitable might be paying other producers higher prices than the IOGA members would have received if they had been entitled to NGPA rates, and the charge that the shut-ins may result in the permanent loss of natural gas.

Since it appears that resolution of the matters raised in the emergency petition would not necessarily depend upon our conclusions with respect to the interpretation of the area rate clauses, and in light of the existence of disputed issues of fact in regard to the petition, the emergency petition will be remanded to the presiding judge for a hearing.

VIII.

On June 26, 1979, IOGA filed a petition for declaratory order raising the question of whether the price escalator

[38] Equitable states in its answer to the briefs on exceptions that after the initial decision was issued, Equitable advised the ten producers to resume production.

clause in the Docket No. RI75-21 settlement agreement, as interpreted by the Commission in this proceeding, is applicable to *future* gas purchase contracts between the four pipelines and the IOGA producers. This is a different issue from the one discussed above. We have previously dealt with the question of whether the area rate clause should be interpreted as authorizing collection of NGPA rates. The instant petition, however, requests the Commission to determine whether, if the clause does authorize NGPA rates, all new contracts must require the pipelines to pay the statutory rates rather than such lower prices as the parties may establish through negotiation.

IOGA asserts that certain of the pipelines have offered contracts to IOGA producers which provide for rates lower than the maximum ceiling prices prescribed in the NGPA, and that some producers may be compelled to accept those contracts unless the Commission issues a declaratory order stating that the area rate clause must continue to govern future contractual relationships.[39] IOGA, in contending that the settlement mandates adoption of statutory rates in future contracts, relies on paragraph 7 of the settlement agreement, which states in part:

> Whether or not now in existence, Contracts in respect of wells first commencing jurisdictional sales on or after January 1, 1976, shall contain provisions consistent with the provisions hereof and shall specify a price at least equal to the higher of the Adjusted Prices, as theretofore increased, pursuant to Paragraph 3 hereof.

IOGA further states that the settlement was intended to provide some measure of protection to producers whose

[39] IOGA also requests that the Commission declare unenforceable any provisions in new contracts to which producers may have felt compelled to assent which are inconsistent with the area rate clause in the settlement agreement, as interpreted by the Commission.

bargaining power is negligible vis-a-vis the interstate pipelines in West Virginia, and that in the absence of deregulation, the pipelines shoud adhere to their bargain and purchase gas at the applicable NGPA ceiling rate.

Consolidated and Columbia have filed responses opposing IOGA's petition.[40] Consolidated argues that as a matter of contract law, an agreement which does not expressly limit the time for continued performance is construed to extend for a reasonable time only. Accordingly, Consolidated asserts that the future contract provision in paragraph 7 of the settlement agreement should be interpreted to require price escalator clauses in future contracts only for a commercially reasonable time. In this regard, Consolidated believes that the incentives for production embodied in the NGPA have significantly diminished the need for perpetual extension of the future contracts provision in paragraph 7 of the settlement.

Columbia contends that the settlement agreement should be interpreted as having expired as to new gas purchases on the effective date of the NGPA. It claims that area rate clauses were necessary under the regulatory system in effect under the Natural Gas Act but that they are now inconsistent with the objectives of the NGPA and with the public interest. Specifically, Columbia argues that under the Natural Gas Act, producers would not have been entitled under their contracts, absent an escalator clause, to collect new area or nationwide rates established by the Commission despite justification under the Natural Gas Act for such new rates. However, Columbia says, the NGPA generally removed pricing authority from the Commission and was intended to permit competitive forces to determine pricing decisions, subject to the ceilings prescribed in the statute. Columbia also requests that the

[40] As stated above, both of these pipelines agree with IOGA that the area rate clause in the new gas settlement authorizes collection of NGPA rates.

Commission, if it concludes that the settlement must be interpreted as IOGA suggests, reopen the proceeding and terminate the settlement prospectively as to new gas purchases.

By order dated July 26, 1979, the Chief ALJ denied Consolidated's request that IOGA's June 26 petition be consolidated for decision with this proceeding, in part because the petition had not been noticed or docketed and was therefore not properly before him. Hence, the initial decision did not discuss the issues raised in that petition. The staff, in its brief on exceptions, renews the request for consolidation. We agree that the issues involved in the petition are sufficiently related to the other questions in this case to warrant consolidation, and we will so order. We will also refer IOGA's petition to the presiding judge for initial decision. The judge will be authorized to establish such procedures (including a hearing, if he determines that there are disputed material issues of fact) as may be necessary to resolve the issues raised in the petition and related pleadings.

It is essential, however, that the proceedings involving IOGA's petitions for declaratory orders not delay the resolution of the issues of whether there is contractual authorization to collect NGPA rates and, if so, whether such rates may be collected on an interim or retroactive basis. Hence, the presiding judge shall issue a decision on those issues as soon as practicable, whether or not the proceedings with respect to IOGA's petitions have been completed.[41]

The Commission orders:

(A) The initial decision of the presiding judge is reversed and the proceeding is remanded to the presiding

[41] IOGA has moved for the opportunity to present oral argument before the Commission on the issues in this proceeding. It does not appear that further elaboration of the views expressed by the parties in their respective briefs is necessary in this case. Accordingly, IOGA's motion will be denied.

judge for further proceedings in accordance with the directions provided in the body of this order.

(B) The Petition for Declaratory Order With Respect to Pricing Provisions in New Gas Purchase Contracts, filed by IOGA on June 26, 1979, is consolidated for decision with this proceeding and is referred to the presiding judge for initial decision.

(C) The issue of interim collections raised by IOGA in its motion of February 12, 1980 is consolidated for decision with this proceedings and is referred to the presiding judge for initial decision.

(D) Pursuant to the authority of the Natural Gas Act, particularly Sections 4, 5, 7, 8, 15, and 16, and the Commission's rules and regulations, a hearing shall be held in this proceeding on the issues raised in the Emergency Petition for Declaratory Order filed by IOGA on July 6, 1979, and, if the presiding judge determines it is necessary, on the issues raised in the petition referred to in paragraph (B) above and on any other issues which must be resolved in this proceeding.

(E) The presiding judge shall convene a conference as soon as practicable for the purpose of establishing procedures for this proceeding. The presiding judge shall be authorized to establish and modify all procedural dates, to consider and rule upon pertinent offers of proof and stipulations of facts, and to establish such further procedures as may in his judgment be required for purposes of this proceeding.

(F) Ashland Oil, Inc., Texas Independent Producers and Royalty Owners Association, Cities of Charlottesville and Richmond, Virginia, Four Corners Gas Producers Association, Mesa Petroleum Company, Tenneco Oil Company, Pennzoil Company, Pennzoil Producing Company, Pennzoil Oil and Gas, Inc., and Pennzoil Louisiana and Texas Offshore, Inc. are permitted to intervene in this

proceeding, subject to the rules and regulations of the Commission; *provided, however,* that the participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene; and *provided, further,* that the admission of said intervenors shall not be construed as recognition by the Commission that they may be aggrieved because of any orders of the Commission entered in this proceeding.

(G) The motion of Ashland Oil, Inc. for leave to file its brief out of time is granted.

(H) IOGA's motion for oral argument is denied.

(I) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner Holden, concurring in part and dissenting in part, will have a separate statement which will be forthcoming.

(SEAL)

Kenneth F. Plumb, Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Small Producer Rates

Before Commissioners: Charles B. Curtis, Chairman, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Docket No. CI78-705

ARAPAHOE PRODUCTION COMPANY

v.

PANHANDLE PRODUCING COMPANY, *et al.*

ORDER GRANTING RELIEF, AND GRANTING PETITION TO INTERVENE OUT OF TIME

(Issued April 13, 1979)

Background

On April 28, 1978, Arapahoe Production Company (Arapahoe), a small producer certificate holder in Docket No. CS71-1002, filed an application for relief in Docket No. CI78-705, stating that Panhandle Producing Company, *et al.* (Panhandle) refuses to pay it the small producer rates [1] for gas produced since August 28, 1975, for sales from certain gas reserves that Arapahoe purchased from Gulf Oil Corporation (Gulf) in 1969. The properties involved are located in Hutchinson County, Texas, and were developed by Gulf, a large producer, prior to being sold to Arapahoe.

Arapahoe alleges that Panhandle refuses to abide by Order No. 428-B which provides that the blanket certificate

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[1] Base rates of 66.3¢, 67.6¢, 68.9¢ and 70.2¢ for gas sold in 1975, 1976, 1977 and 1978, respectively, as adjusted for tax and Btu content. Apparently, Panhandle is paying some monies to Arapahoe on a continuing basis, but is withholding a portion of these rates pending resolution of this issue by the Commission.

authorization prescribed therein is applicable to small producer sales made from large producer developed reserves acquired prior to March 18, 1971. Arapahoe contends that it cannot afford to continue service to Panhandle at a rate of less than it is entitled to under its contract and the Commission's regulations. Therefore, Arapahoe requests that it be permitted to abandon the sale to Panhandle provided that Arapahoe thereafter continues to sell the gas in interstate commerce under terms no less favorable than those contained in its contract with Panhandle. Arapahoe contends that it is not asking for an adjudication of the contractual rights between Arapahoe and Panhandle, but rather is directing its request for relief to its obligation under the Natural Gas Act.

On May 8, 1978, Panhandle filed a response to Arapahoe's application denying that Arapahoe is entitled to the requested relief. Panhandle contends it was Opinion No. 742, issued August 28, 1975, not Order No. 428-B, which authorized a small producer rate not to exceed 130% of the Commission determined base ceiling rate applicable to a comparable large producer, and that Opinion No. 742 expressly provided as follows:

> "Rate regulation as prescribed herein shall not apply to any jurisdictional sales made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer."

Panhandle states that Arapahoe, having acquired the developed reserves from a large producer, is not entitled to the rates authorized under Opinion No. 742.

Panhandle also advised in its response that Arapahoe has filed suit against Panhandle in the District Court of Hutchinson County, Texas, seeking the same pricing relief

as requested from the Commission.[2] Panhandle contends that the dual filing of the suit and the application for relief exposes Panhandle to the possibility of double jeopardy and that by filing such suit Arapahoe has recognized that the pricing aspect involves private contractual rights which can be determined by the court. Therefore, Panhandle requests that Arapahoe be denied its relief respecting price or stay a ruling until Arapahoe's rights are judicially determined.

Additionally, Panhandle states that Arapahoe's request for abandonment is not in conformity with the Commission's regulations. Panhandle requests that the Commission either deny the abandonment or require supplemental information to make the application conform with the requirements of the Regulations.

On May 12, 1978, Arapahoe responded to Panhandle's comments and stressed that there is nothing in Opinion No. 742 to indicate that the Commission's prior treatment of small producer sales from large producer developed reserves was intended to be modified. Since Order No. 428-B specifically denied small producer rate treatment to sales from large producer developed reserves acquired by small producers on or after March 18, 1971, Arapahoe contends that the Commission by definition found pre-March 18, 1971, acquisitions to be subject to small producer rate treatment. Moreover, Arapahoe notes that this point is clarified by Order No. 568, issued on July 14, 1977, which defines small producer reserves, in part, as ". . . developed reserves held on March 17, 1971, by a small producer, regardless of whether such reserves were developed by a large or small producer . . . ." Arapahoe contends that in so providing, Order No. 568 simply continues in effect the policy which

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[2] Since this is a matter of the regulation of small producers, under *Ashland Oil & Refining Co.* v. *FPC,* 421 F2d 17 (CA6, 1970) the Commission has the authority to proceed regardless of the existence of the proceeding in the state court.

the Commission adopted in Order Nos. 428 and 428-B and that it is illogical and arbitrary that Order No. 742 should be interpreted differently.

Arapahoe further states that Panhandle had previously refused to pay the small producer rate on the Gulf developed reserves because of a dispute as to whether such rates were contractually permitted. However, Arapahoe claims that in a letter dated December 14, 1977, Panhandle finally admitted that such rates were contractually permitted, but then refused to pay the small producer rate allegedly because of the provisions of Opinion No. 742.

In its supplement, Arapahoe also refers to the litigation against Panhandle in the District Court of Hutchinson County, Texas, to recover the small producer increment and to Panhandle's reference in its response to "double jeopardy". Arapahoe states that if Panhandle pays Arapahoe the small producer increment, Arapahoe will have to dismiss both this proceeding and the state court proceeding. Arapahoe goes on to say that before the state court can determine the rights of Arapahoe under state law, a determination must be made as to what Arapahoe's rights are under the Natural Gas Act, and that this Commission, not the state courts in Texas, is best situated to make this determination.

Public notice of the application for relief was issued on June 5, 1978, publication in the Federal Register being on June 12, 1978 (43 FR 25369). On July 7, 1978, Colorado Interstate Gas Company (CIG) filed its Petition for Leave to Intervene Out of Time stating that the volumes of gas purchased by Panhandle from Arapahoe are, after processing sold and delivered by Panhandle to CIG, together with gas purchased by Panhandle from other producers in the area, and all comingled by CIG with its other gas supplies in Texas and transported or sold for resale in interstate commerce, and the relief requested, if granted, would have an effect upon CIG and upon its customers.

Discussion

It is clear that the Commission did not intend to exclude from coverage under a small producer certificate reserves acquired from a large producer prior to the issuance of Order No. 428 because the Commission specified in Order No. 428-B, mimeo pp. 11-12:

> "Finally, the blanket certificate authorization is applicable to jurisdictional sales made by a small producer from gas reserves acquired prior to the issuance of Order No. 428 by the purchase of developed reserves in place from a large producer. The problem sought to be solved in Section 157.40(c) by the exclusion from blanket authorization of sales from certain gas reserves has no applicability to previously acquired reserves. However, for acquisitions of developed reserves in place made on or after the issuance of Order No. 428, a small producer must apply for separate certificate authorization for jurisdictional sales relating thereto regardless of whether the large producer who sold the reserves in place retained any rights or reversionary interest in the properties involved."

While the wording of Section 157.40(c), to the extent here relevant, was modified slightly in Opinion No. 742, in all material respects it remained the same as that promulgated in Order No. 428. Moreover, there is nothing in the text of Opinion No. 742 which would suggest that the Commission had any intention of modifying Section 157.40(c) in the fashion claimed by Panhandle.

Arapahoe has properly construed the Commission's intention with regard to the rate treatment to be applied to small producer sales from acquired large producer developed reserves. That is, small producers can receive a higher rate to the extent that the small producer acquired such reserves *before* the Commission established different rate treatment for small producer sales in Order No. 428 on

March 18, 1971. Panhandle's interpretation would disqualify small producer rate treatment to all reserves developed by large producers irrespective of the date of small producer acquisition. This position is erroneous. Since Arapahoe acquired reserves developed by Gulf in 1969, well before the issuance of Order No. 428, it should be accorded small producer rate treatment to the extent contractually permitted.[3]

In view of the above, we do not reach Arapahoe's request for abandonment authority or other contingent avenues of relief.

In certain of its filings Panhandle has made allegations regarding certain communications between Arapahoe and members of our technical staff, which communications Panhandle has labeled as *ex parte*. We have inquired into the substance of and circumstances and timing surrounding the communications and find the allegations to be groundless.

We are gravely concerned with any suggestion that our processes are not fundamentally fair, and consequently we have explored this allegation thoroughly to determine if Panhandle suffered any prejudice whatsoever in this matter because of Arapahoe's communications.[4]

The facts are that a representative of Arapahoe talked on the telephone with two members of the staff of the Office

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[3] Arapahoe has submitted a copy of its April 1, 1975, replacement contract with Panhandle which contains an area rate clause and appears to permit collection of the claimed rates.

[4] The inquiry went considerably beyond the technical question of compliance with our regulations. Under 18 C.F.R. 1.4(d), *ex parte* communications pertain to *pending* proceedings. Here, the two communications took place on April 24, 1978, and Arapahoe's applications was not filed until April 28, 1978. Thus, there was no violation of our regulations.

of Pipeline and Producer Regulation on April 24, 1978. According to the staff members, the Arapahoe representative's questions related generally to the treatment accorded gas produced from small producers' wells where the wells had been developed by a large producer but sold to the small producer prior to the issuance of Order 428. The Commission's staff members cited language from Order 428-B—specifically, the paragraph continuing from the bottom of 46 FPC 52 to the top of 53—as dispositive. Apparently, Arapahoe then advised Panhandle of its communications with our staff, and did so prior to Panhandle's filing on May 8 of its reply to Arapahoe's application.

Thus, the staff members concerned (who are not lawyers) simply referred Arapahoe to what they regarded to be the pertinent text of Federal Power Commission orders. In so doing, and in stating that the language from Order 428-B governed in this situation, they were merely voicing established Commission policy and practice, for the Commission had earlier dealt with situations that were identical on all pertinent facts.[5] Moreover, the two staff members did not appear before or advise the Commission in its deliberations on this matter.

In sum, we see no element of unfairness or prejudice to Panhandle arising out of the communications: Panhandle was given prompt disclosure of the communications, the staff members merely communicated established Commission policy, Panhandle had a full opportunity to respond, and did so, and the Commission's decision did not depend—indeed, was not at all influenced—by anything the staff members said which might in turn have been said by

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[5] *See,* Order issued June 10, 1976 in CS66-57, *et al.*, Appendix A, p. 2, n.13; as well as letters from Secretary dated March 11, 1977 to Texlan Oil Company, Inc., reply reference number BNG-231, and dated May 5, 1976 to Mr. Franklin E. Bernsen in Docket Nos. CS72-647 and CS76-548.

Arapahoe's representative in the two conversations with staff members.

The Commission finds:

(1) Arapahoe is entitled to small producer rate treatment with respect to gas delivered to Panhandle on and after August 28, 1975, from the developed reserves acquired from Gulf in 1969.

(2) Participation in this proceeding by Colorado Interstate Gas Company may be in the public interest.

(3) Panhandle's allegations of *ex parte* communications are without merit and any requested relief based thereon should be denied.

The Commission orders:

(A) Arapahoe is entitled to small producer rate treatment with respect to gas delivered to Panhandle on and after August 28, 1975, from the developed reserves acquired from Gulf in 1969.

(B) CIG is hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission; *Provided, however,* that the participation of such intervenor shall be limited to matters affecting asserted rights and interests as specifically set forth in the petition to intervene; *Provided, further,* that the admission of such intervenor shall not be construed as recognition by the Commission that it might be aggrieved because of any order of the Commission entered in this docket.

(C) All other requests of the parties for relief are hereby denied.

By the Commission.

(SEAL)

Lois D. Cashell,
Acting Secretary.

Louisiana Law Review (1980). The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Mineral Rights, pages 588, 601-602

MINERAL RIGHTS

Patrick H. Martin *

The tempo of litigation concerning mineral rights appears to have increased in the past year. Undoubtedly the state bar can expect this trend to continue for several reasons. Drilling activity for oil and gas has increased in recent years. This is attributable to increased demand and to greatly increased prices allowed under federal regulations for both crude oil and natural gas. And with the price increases, it has become profitable to rework older fields or undertake enhanced recovery techniques that a short time ago would have been economically or technically unfeasible.

As a result, the rights to produce minerals and enjoy their revenues have become more valuable, giving property claimants an ever greater incentive to establish their rights. Claims will increase as some lessors come to feel their leases are unfair, many of them executed at a time when a one-eighth royalty and low bonus and delay rental prevailed, while their neighbors with more recent leases enjoy much higher income. Additionally, landowners whose properties are burdened by servitudes reserved or granted under far different economic circumstances are likely to assert the invalidity of those rights.

The next several years will be very important ones in the development of Louisiana mineral law. The Mineral Code, effective January 1, 1975, is still quite new, and relatively few cases have arisen under it. In the background, and heavily affecting traditional property rights

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issues, is a complex mass of federal regulations presenting problems for all parties to which a state court should be sensitive. There will be many significant cases, and the courts will have the opportunity to render decisions that can provide for certainty and stability in an area of the law that is acutely important for this state. If they fail, the effects will be felt for a generation, not only by mineral rights owners and claimants but also by the other citizens of the state and, indeed, the country.

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Gas Purchase Contract Litigation

Another area of the law that has produced significant litigation in the past term is gas purchase contract problems. Such contracts are complex and are today significantly affected by federal regulation under the Natural Gas Act of 1938[43] and now the Natural Gas Policy Act of 1978.[44] A division between "interstate gas" and "intrastate gas" has profoundly influenced production and marketing in the past, and on "interstate gas," gas purchase contract terms have been dictated by the Federal Power Commission (recently succeeded by the Federal Energy Regulatory Commission).

Payment of Royalty; Purchase of Gas; Favored Nation Clause

The Louisiana Supreme Court issued a significant decision in one gas purchase contract case, *Hall* v. *Arkansas-*

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[43] 15 U.S.C. §§ 717-17w (1976).

[44] 15 U.S.C.A. §§ 3301-432 (1979).

Louisiana Gas Co.[45] The controversy arose from a contract pertaining to the Sligo field in Bossier Parish for the purchase of gas by the defendant Arkansas-Louisiana Gas (Arkla) for a term of twenty-eight years, beginning in 1952. The agreement contained a "two party favored nation" clause in which Arkla promised that, should it purchase gas from any other seller in the field at a higher price, it would escalate the purchase price to the sellers (plaintiffs here) under the 1962 agreement to the same price. In 1961 Arkla acquired, through an assignment, a fifteen percent working interest in an oil and gas lease granted by the United States on land in the Sligo field. As a lessee under this lease, Arkla was bound to pay a royalty to the United States; the United States could elect to be paid its royalty in kind or on the basis of the fair market value attributed to its percentage of production. The government chose the latter method; and, unlike other lessors, the government had the power under the lease to specify the value of the gas for purposes of royalty computation. The value specified by the government for Arkla's royalty was higher than the purchase price paid by Arkla to the plaintiffs under the 1952 gas purchase contract. The plaintiff's brought suit claiming the royalty payment was a purchase within the meaning of the favored nation clause, thus triggering an escalation of the price. Although remanding the case for recomputation of damages, the supreme court affirmed the second circuit's affirmation of a trial court judgment for plaintiffs.

There are several troublesome aspects to the *Hall* case, but the most significant is the court's determination that a payment of royalty, in which the lessor has the option of taking the gas in kind and the power to specify the value upon which the royalty is paid, is a purchase of gas by the lessee. If the option of taking or not taking the gas was the lessee's, the taking of gas and the paying of

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[45] 368 So. 2d 984 (La. 1979).

a royalty would seem more clearly a purchase. And if the "price" paid for that gas were set by some factor other than the determination by the lessor of the gas's value, that would lend itself to the conclusion that there had been a "purchase." But such was not the case.

Consider the dilemma of the purchaser of gas who is also a producer in similar circumstances under the court's approach. Its only choices are to pay the royalty specified by the United States, and thus trigger the escalation clause, or to give up the lease when the government demands a royalty for gas valued at a higher level than the sale price of other gas in the field, and thus lose not only the royalty gas of the lessor but also all the working interest gas. Neither of these seems a very sound choice, and it brings out the point that the election of the *lessor* not to take gas in kind is not a purchase of the gas by his *lessee*. This is not to suggest that a regulatory agency could not for some purposes treat it as a sale of gas (or oil under a similar provision in a lease) or that the parties themselves could not define it to be a purchase. The issue is whether these parties meant to treat it as a purchase for purposes of the gas purchase contract escalation clause, and it is doubtful that most people in the industry would regard it as a purchase. Accordingly, it strikes this writer as a questionable proposition. Nevertheless, the supreme court allowed recovery for damages all the way back to the time when defendant first paid the higher royalty to the United States, even though the Federal Power Commission, which had jurisdiction over the purchase price, would have had to allow the operation of the escalation clause for there to have been damage.[46] The court felt it was the defend-

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[46] The Federal Power Commission would allow price escalation clauses in very narrow circumstances after April 3, 1961, Order 242, 18 C.F.R. § 154.93, 27 Fed. Reg. 1356 (1962), and limited their operation in contracts in effect on June 7, 1954, Order 174-B, 18 C.F.R. § 154.94, 19 Fed. Reg. 8809 (1954).

ant's fault that prevented a determination on that issue by the F.P.C. at the time of the "purchase." [47]

[47] The court relied on Civil Code article 2040 which provides: "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it." The only way in which the defendant "prevented" fulfillment of the "condition" (filing of a new rate schedule in hopes of getting F.P.C. approval of a higher rate) was failing to inform plaintiffs of the "purchase" by the defendant.

No. 78-1789

IN THE

Supreme Court of the United States

October Term, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN AND NATIONAL AMERICAN BANK, NEW ORLEANS, CO-TESTAMENTARY EXECUTORS OF THE SUCCESSION OF SEYMOUR WEISS, *Respondents.*

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1.

When a pipeline company, such as Arkansas Louisiana Gas Company ("Arkla") in this case, wrongfully injures and damages individual citizens with whom it has contracted by uncooperatively breaching and violating its private gas sales contracts, who must ultimately bear the legal and financial responsibility for the breach of contract and the actual losses and damages, the pipeline company and its private stockholders which violated the contract and caused the losses and damages *or* the innocent and injured citizens who through no fault of their own sustained and incurred the losses and damages?

2.

Whether under our American System of Justice Arkla, as respondents' uncooperative and defaulting contractual obligor in this private breach of contract case, is legally "*estopped*" from relying upon and unjustly taking advantage of its *own* continued breach of contract for 14 years, its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975 and the resulting "*Catch-22*"[1] non-performance of the notice filing requirement of section 4 (d) of the Natural Gas Act as occasioned thereby with respect to

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[1]See: Joseph Heller, *Catch-22* (Simon & Schuster, 1955), at pp. 45 & 46:

> " 'Sure there's a catch,' Doc Daneeka replied. 'Catch-22. Anyone who wants to get out of combat duty isn't really crazy.' There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy

respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas (which "*contractually authorized*" prices were well below the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") from September 1961 to September 1972 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets and profits for all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from September 1961 to September 1972 with respect to their dry and residue gas due to its continued breach of contract since September 1961 and its uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975?

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to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to: but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
'That's some catch, that Catch-22,' he observed.
'It's the best there is,' Doc Daneeka agreed."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1980

No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN AND NATIONAL AMERICAN BANK, NEW ORLEANS, CO-TESTAMENTARY EXECUTORS OF THE SUCCESSION OF SEYMOUR WEISS, *Respondents.*

RESPONDENTS' BRIEF ON THE MERITS

I.

INTRODUCTION

The voluminous record in this case and especially Arkla's own "*Internal Memorandums*" (Exs. P-58, J.A. 139; P-62, J.A. 140; P-77, J.A. 143; P-80, J.A. 144; P-82, J.A. 146; P-176, J.A. 152; P-177, J.A. 153; and P-192, J.A. 155) graphically

depict what has unfortunately happened to fifteen individual citizens of this Nation, Frank J. Hall, et al, who in 1952 in good faith contracted with and relied upon Arkla, a pipeline company-conglomerate, and then were subsequently forced by Arkla to spend almost 7 years of their lives engaged in expensive, burdensome and protracted litigation in order to simply discover the true facts concerning Arkla's continued breach of contract for 14 years and to protect themselves against the losses and damages they wrongfully sustained and incurred for 14 years because the conglomerate-obligor at its *own* unilateral whim and caprice elected *not* to timely honor and cooperatively fulfill its contractual commitments and obligations for 14 years.

After more than six years of expensive, burdensome and protracted breach of contract litigation conducted before a Louisiana state district court,[2] the United States District Court for the Western District of Louisiana,[3] the Federal Power Commission (F.P.C.),[4] a Louisiana state court of appeal,[5] the Loui-

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[2]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, Louisiana, "Judgments" rendered on July 30, 1975, October 14, 1977, December 2, 1977, December 5, 1977, and May 17, 1979, respectively, J.A. 5, 7, 22, 27 & 69.

[3]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist.Ct.W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d), J.A. 160, 173 & 175.

[4]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI-76-28, Federal Power Commission "Orders" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[5]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 359 So.2d 255 (La.App.2d 1978), and 379 So.2d 1142 (La.App.2d 1980), J.A. 29 & 72.

siana supreme court,[6] the Federal Energy Regulatory Commission (F.E.R.C.)[7] and this Court in Docket No. 78-986, it has now been definitively established and confirmed that Arkla, as respondents' private contractual obligor under the 1952 *"favored nations"* contract, wrongfully injured and damaged the fifteen individual respondents herein from September 1961 through December 1975 in the same wrongful manner that the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation, and the Louisiana-Nevada Transit Company, as uncooperative and defaulting pipeline companies, also wrongfully injured and damaged other individual and corporate citizens of this Nation by uncooperatively breaching and violating similar private gas sales contracts. See: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

By consistently applying basic principles of contract law and fundamental justice to the *evidence* in the above cited cases, the courts in the above cited cases properly and justly required the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation and the Louisiana-Nevada Transit Company, as uncooperative and defaulting pipeline companies that had breached and violated similar private gas sales

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[6]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 362 So.2d 1120 (La.S.Ct. 1978); 368 So.2d 984 (La.S.Ct. 1979); and Docket No. 67,225, Supreme Court of Louisiana, application for certiorari denied on May 2, 1980, J.A. 49, 50, 51 & 86.

[7]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "Orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively. See: Appendices A, B & C of this brief.

contracts, to independently respond in compensatory damages out of their *own* abundant private corporate assets and profits for the losses and damages which they wrongfully caused other citizens of this Nation to sustain and incur. By consistently applying these *same* basic principles of contract law and fundamental justice to the *evidence* presented in this case (including the F.P.C.'s clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183), the Louisiana supreme court below properly and justly required Arkla, as the uncooperative and defaulting pipeline company that breached and violated its 1952 "*favored nations*" contract with respondents from 1961 to 1975, to independently respond in compensatory damages out of its *own* abundant private corporate assets (now over \$1,000,000,000) and profits (now over \$120,000,000 each year) for all of the losses and damages (approximately \$2,700,000) that Arkla wrongfully caused respondents to sustain and incur from September 1961 through December 1975 with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas.

Arkla, in this proceeding (Docket No. 78-1789), has requested that this Court reduce the quantum of compensatory damages awarded to respondents by the Louisiana supreme court below from approximately \$2,700,000 to \$1,700,000. Arkla has based its claim for relief upon the unconscionable "*Catch-22*" contention that *because* Arkla, as respondents' private contractual obligor under the 1952 "*favored nations*" contract, rendered it absolutely *impossible* for respondents to timely prepare and file routine section 4 (d) notices setting forth their "*contractual entitlement*" to 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas (which "*contractually authorized*" prices as paid by Arkla to the United States government for the government's dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") with the F.P.C. from September 1961 to September 1972 by virtue of its *own* continued breach of contract for 14 years *and* its *own* uncooperative and effective withholding of

all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975 Arkla is completely exempted and shielded from its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for the actual losses and damages (approximately $1,000,000) that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 due to its continued breach of contract for 14 years and its uncooperative and effective withholding of all of the true facts concerning is continued breach of contract from respondents from September 1961 to December 1975.

The ultimate question to be resolved by this Court in this proceeding involves a basic principle of fundamental justice: who, Arkla and its private stockholders *or* respondents, must bear the legal and financial responsibility for the actual losses and damages (approximately $1,000,000) that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 due to Arkla's continued breach of contract from September 1961 through December 1975 *and* Arkla's own uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975?

Respondents respectfully submit and will herein demonstrate that basic principles of fundamental American justice as heretofore consistently recognized, confirmed, applied and enforced by this Court *and* all other courts of this Nation for two centuries will *not* permit Arkla, the uncooperative and defaulting wrongdoer in this private breach of contract case, to commit an obvious injustice upon fifteen individual citizens for 14 years with full and complete impunity and immunity from Arkla's *own* separate and independent corporate obligation to respond in compensatory damages out

of Arkla's *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for all of the actual losses and damages (approximately $1,000,000) that Arkla wrongfully inflicted upon the fifteen individual respondents herein with respect to their dry and residue gas from September 1961 through September 1972.

Moreover, respondents respectfully submit and will herein demonstrate that the definitive "*Orders*" as heretofore rendered by the F.P.C.,[8] the Louisiana supreme court[9] and the F.E.R.C.[10] in connection with this private breach of contract case correctly recognized and consistently confirmed that Arkla's independent payment of compensatory damages out of its *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 will *not* in any way adversely affect the substantive regulatory purpose of the notice provision of section 4 (d) of the Natural Gas Act which is to protect "*the relevant public interest*" against "*excessive prices*" (prices that *exceed* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") for dry and residue gas sold in interstate commerce. The procedural notice provision of section 4 (d) was *never* designed or intended by Congress to be used by uncooperative and defaulting pipeline companies as a "*Catch-22*" tool for unilaterally destroying the "*integrity*" and "*stability*" of legitimate private contractual rights with complete corporate impunity and immunity from all losses and damages caused as a result thereof.

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[8]See: F.P.C. clarifying "*Order*" dated November 8, 1978, Ex. D-59, J.A. 183.

[9]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51.

[10]See: F.E.R.C. "*Orders*" dated April 25, 1979, May 18, 1979 and July 16, 1979, respectively, which are attached to this brief as Appendices A, B & C.

As respondents will further demonstrate in connection with this private breach of contract case, the F.P.C.[11] and the F.E.R.C.[12] have heretofore at respondents' request confirmed the Commission's applicable "*maximum, lawful, just and reasonable area rate ceilings*" for respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas for the 1961 to 1972 period *and* have heretofore thoroughly performed their section 4 (d) "*review function*" with respect to respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from September 1961 to September 1972 in order to confirm that respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf were *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" and, hence, confirm that respondents' independent recovery of compensatory damages out of Arkla's *own* abundant private corporate assets and profits for their actual losses in this case does *not* in any way violate the Commission's *substantive* regulatory purpose of protecting "*the relevant public interest*" against "*excessive prices*" for dry and residue gas sold in interstate commerce from September 1961 to September 1972.

II.

STATEMENT OF THE CASE

On January 11, 1952 the fifteen individual respondents herein, Frank J. Hall, et al, and Arkla contracted for respondents, as "*royalty interest owners-working interest owners-overriding royalty interest owners-sellers*", to supply natural gas, condensate, extractable liquid hydrocarbons and

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[11]See: F.P.C. clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183.

[12]See: F.E.R.C. "*Orders*" dated April 25, 1979, May 18, 1979 and July 16, 1979, respectively, which are attached to this brief at Appendices A, B & C.

plant products produced from their leases in the Sligo Gas Field, Bossier Parish, Louisiana to Arkla for 28 years at the "*highest prices*" that Arkla "*paid*" to anyone else for comparable production produced from the *same* Sligo Gas Field under any agreement, "*written or oral*".[13] Obviously, in order for respondents to timely receive and obtain the legal fruits and benefits of their "*favored nations*" rights under the 1952 contract, it was necessary for Arkla, as the contractual obligor under the subject "*favored nations*" clause, to timely honor and cooperatively fulfill its affirmative legal duty[14] to advise and inform respondents when it began paying "*higher prices*" to other mineral interest owners in the Sligo Gas Field.

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[13]See: The sworn testimony of Frank J. Hall, R.3523 & 3524, R.3528 & 3529, R.4962 & 4963; Ex. P-272, R.3493; and the sworn testimony of Arkla's *own* in-house counsel, Gilbert L. Hetherwick, R.4221 thru 4225.

Moreover, the unanimous and consistent decisions of the courts below with respect to a proper construction and interpretation of the subject "*favored nations*" clause based upon the "*true intentions*" of the parties when they negotiated and perfected the subject "*favored nations*" contract in January 1952 are entirely consistent with the independent "*concern*" that Arkla's Senior Vice President, Billy E. Harrell, expressed to Arkla's top officers and officials in his "*warning memorandum*" dated November 20, 1961 (see Ex. P-58, J.A. 139) with respect to Arkla's payment of "*higher prices*" to the United States government for the government's royalty gas produced from the *same* Sligo Gas Field and delivered into Arkla's *same* Sligo gas processing plant. See, also: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971) and *Louisiana Land & Exploration Co. v. F.E.R.C.*, 574 F.2d 204 (5th Cir. 1978), writs *denied*, 439 U.S. 1127 (1979).

[14]Contrary to Arkla's obviously erroneous and self-serving contentions in this proceeding, Arkla under well established principles of Louisiana Civil Law (Articles 1901, 1903, 1930 and 2040 of the Louisiana Civil Code) and Common Law (see the authorities cited in 17A C.J.S., Contracts, §328, Note 41, at pp. 286 & 287) unquestionably had an affirmative legal duty and contractual obligation under the January 11, 1952 "*favored nations*" contract with respondents to *cooperate* with respondents to the fullest in order to

Beginning in September 1961, Arkla, unbeknown to respondents, began breaching and violating respondents' "*favored nations*" rights by paying "*higher prices*" to the United States government for the government's residue royalty gas, condensate, extractable liquid hydrocarbons and plant products as produced from the *same* Sligo Gas Field and delivered into Arkla's *same* Sligo gas processing plant from 1961 through 1975.[15] Arkla, as respondents' private contractual obligor under the 1952 "*favored nations*" contract, compounded its breach and violation of the "*favored nations*" contract by uncooperatively advising and informing respondents from 1961 to 1974 that they were receiving for their royalty gas, working interest gas, overriding royalty interest gas, condensate, extractable liquid hydrocarbons and plant products the "*highest prices*" that Arkla was paying to anyone else in the

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insure that respondents timely received the legal fruits and benefits of their private legal and contractual "*favored nations*" rights in a manner consistent with the "*true intentions*" of the parties who negotiated and perfected the contract in January 1952 and all applicable laws, rules and regulations from September 1961 thru December 1975; and Arkla cannot be heard to complain in that it violated its affirmative legal duty and obligation to timely cooperate with respondents to the fullest from 1961 to 1975. See, also: *Gulf Oil Corp. v. American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla.S.Ct. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. 1976); *Whitfield Cons. Co., Inc. v. Commercial Devel. Corp.*, 392 F.Supp. 982 (1975); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

[15]See: Section 2(n) of Arkla's January 1961 protective lease contract with the United States government, Ex. P-45, J.A. 121, 126; Arkla's November 15, 1962 "letter contract" with the United States government, Ex. P-82, J.A. 146; Arkla's "*Gas Purchase Account*" checks, Ex. P-85 thru P-138, R.2501, 2502, 2884 & 2885; and the monthly production and sales reports for the government parcel #3, Ex. P-52, R.2644, 2650.

Sligo Gas Field, when in fact Arkla was paying *"higher prices"* to the United States government.[16]

Respondents did *not* discover any of the true facts concerning Arkla's contractual agreements with the United States government and the *"higher prices"* paid by Arkla to the United States government pursuant thereto until June 26, 1974 when respondents' undersigned counsel pursuant to the *"Freedom of Information Act"* received a letter from the United States Department of the Interior dated June 25, 1974 (Exs. P-142 & P-143, R.2604, 2608, 2622 & 2722). Due to the fact that Arkla continued to uncooperatively withhold all of the true facts concerning its contractual agreements with the United States government and the *"higher prices"* paid by Arkla to the United States government under said contractual agreements, it became necessary for respondents to file a breach of contract lawsuit against Arkla in order to judicially discover and obtain all of the true facts concerning Arkla's breach of contract for the prior 14 years from Arkla's *own* private corporate files and records and to recover compensatory damages from Arkla's *own* abundant private corporate assets and profits for all of their actual losses and damages. Subsequently, Arkla itself invoked the original and concurrent jurisdiction of the Louisiana courts below in order to have

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[16]The sworn testimony of Frank J. Hall, R.3563 thru 3573 and R.4961 thru 4964; W. E. Hall, Jr., R.3751 thru 3752 and R.3786 thru 3796; and Arkla's Senior Vice President, B. E. Harrell, R.4536 & 4562, confirmed that Arkla had uncooperatively and inaccurately advised and informed respondents from 1961 to 1974 that respondents, as *"royalty interest owners-working interest owners-overriding royalty interest owners-sellers"*, were receiving the *"highest prices"* that Arkla paid to anyone else in the Sligo Gas Field when in fact Arkla was paying *"higher prices"* to the United States government under section 2(n) of the 1961 lease contract (Ex. P-45, J.A. 121) and the November 15, 1962 *"letter contract"* (Ex. P-82, J.A. 146) by means of monthly checks drawn and issued on Arkla's *"Gas Purchase Account"* (Ex. P-85 thru P-138, R.2501, 2502, 2884 & 2885).

Moreover, Arkla's own *"internal memorandums"* and *"letters"*, as prepared by Arkla's *own* officers and officials from November 20,

those courts definitively resolve and adjudicate the private breach of contract and damage dispute between respondents and Arkla.[17]

Before the instant breach of contract case was tried on its merits before the Louisiana district court below, both the United States District Court for the Western District of Louisiana[18] and the F.P.C.[19] thoroughly reviewed the case, declined to exercise their jurisdiction over the case and deferred the resolution and adjudication of the instant private breach of contract and damage dispute between respondents and Arkla to the Louisiana state courts.

1961 through August 19, 1975 and which were judicially discovered and obtained by respondents in this case from Arkla's *own* private corporate files and records, clearly establish and confirm that Arkla uncooperatively withheld all of the true facts concerning its contractual agreements with the United States government from respondents for 14 years in order to avoid *"a difficult problem"* with respect to honoring respondents' *"favored nations"* rights and, hence, save Arkla and its stockholders *"millions of dollars"* at respondents' loss, damage, detriment and expense. See: Exs. P-58, J.A. 139; P-62, J.A. 140; P-64, J.A. 141; P-77, J.A. 143; P-80, J.A. 144; P-81, J.A. 145; P-82, J.A. 146; P-174, J.A. 147; P-176, J.A. 152; P-177, J.A. 153; P-178, J.A. 154; and P-192, J.A. 155.

[17]See: Arkla's *"Petition-In-Reconvention"*, J.A. 192, and Arkla's *"Motion for Separate Trial of Certain of the Actions Cumulated in this Suit"*, J.A. 201, wherein Arkla affirmatively invoked the original and concurrent jurisdiction of the Louisiana state courts over the instant private breach of contract and damage dispute.

[18]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist.Ct.W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d), J.A. 160, 173 & 175.

[19]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "Orders" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

Specifically, the Federal Power Commission in deferring this private breach of contract case to the Louisiana state courts correctly determined and concluded that:

A. "*Order*" dated March 8, 1976:

"The jurisdictional issue before us arises out of an alleged breach of contract by Arkla for its failure to pay the respondents a higher rate for natural gas pursuant to the favored nations clause in the underlying sales contract.

... It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court. An examination of two prior Commission decisions is indicative of this policy ...

The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the *Pan American* case, *supra*, or the *Rowan* case, *supra*. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction ... While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions." See: Ex. D-55, J.A. 177.

B. "*Order*" dated November 8, 1976:

"Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its '*Other Southwest Area Rate*' Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From Jan. 1, 1965 Thru Sept. 30, 1968	From October 1, 1968 Thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

> 'I. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contracturally authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 "Most Favored Nation" contract and the related Arkansas Louisiana Gas Company division order contracts.'

While the Commission has jurisdiction over natural gas containing *liquefiable* hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream.[4] Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether the respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue.

4. Mobil Oil Corporation v. Federal Power Commission, 483 F.2d 1238 (CADC 1973)."

See: Ex. D-59, J.A. 183.

C. "*Order*" dated January 7, 1977:

> "Arkla originally had sought a determination that the 'favored nations' clause in its January 11, 1952, contract with Frank J. Hall, *et al.* (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue ...
>
> Arkla's application for rehearing presents no facts or legal principles that would warrant any change in or modification of the Commission's order issued November 8, 1976." See: Ex. D-72, J.A. 188.

After the United States District Court for the Western District of Louisiana and the Federal Power Commission consistently declined jurisdiction over the instant breach of contract dispute and deferred the resolution and adjudication of the instant breach of contract dispute to the Louisiana state courts, both respondents and Arkla underwent 6 years of expensive, burdensome and protracted breach of contract litigation through the Louisiana state courts. The Louisiana supreme court on March 5, 1979[20] finally concluded and held that Arkla had wrongfully breached and violated respondents' private legal and contractual "*favored nations*" rights from September 1961 through December 1975 and had wrongfully injured and damaged respondents for 14 years by "*preventing*" and "*precluding*" respondents from timely receiving and obtaining the legitimate fruits and benefits of their "*favored nations*" rights in a manner consistent with the "*true intentions*" of the parties and all applicable laws, rules and regulations from September 1961 through December 1975. The Louisiana supreme court in reaching its decision expressly took cognizance of and relied upon the correct determinations of the F.P.C. as set forth in the F.P.C.'s clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183. See that portion of

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[20]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51.

Louisiana supreme court's judgment of March 5, 1979 beginning at page 62 of the Joint Appendix.

With respect to the quantum of compensatory damages issue presented in this case, Arkla, contrary to its position in this proceeding, has heretofore candidly disclosed and consistently maintained that:

A. *August 19, 1975:*

> "The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company ... It should also be stated that plaintiff's demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.
>
> ... [i]t is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects ..."
> See: Ex. P-192, J.A. 155.

B. *March 19, 1976:*

> "The Company in the last two or three years has experienced litigation involving several of its gas purchase contracts, arising basically from the difference between earlier and current prices for gas under producer sales. No one of these legal actions is material as that term is generally defined. Some of these have been settled, settlements of others is expected and at least one involving a claim estimated at a maximum of $3.5 million is still pending."
> See: Ex. P-193, R.2795 & 2796.

C. *April 1976:*

> "The lawsuit referred to in Item 5 of defendants Form 10-K filed March 1976 as 'one involving a claim estimated at a maximum of $3.5 million' is the present lawsuit."
>
> "The material included in the report at Item 5 was prepared by the defendant's attorneys Gilbert L. Hetherwick and Robert Roberts, Jr."
>
> "Insofar as Item 5 of defendant's Form 10-K, referred to

in Interrogatory No. 11, is concerned, defendant's attorney Robert Roberts, Jr. made the estimate of the maximum amount which, if plaintiffs were wholly successful in their suit, might be recovered in the suit."
See: Exs. P-194A, P-195A & P-196A, R.2812, 2813 & 2814.

Respondents, based upon the F.P.C.'s clarifying "*Order*" dated November 8, 1976 (Ex. D-59, J.A. 183) and the data as judicially discovered and obtained from Arkla's *own* private corporate files and records, computed through detailed calculations their actual losses and damages for the entire 1961 through 1975 period to be a minimum of $2,809,199.08 (See: Exs. P-319-A thru P-331, R.4008 thru 4068, as summarized on Ex. P-320-B, J.A. 158) with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas. The courts below, based upon the F.P.C.'s clarifying "*Order*" dated November 8, 1976 (Ex.D-59, J.A.183) and the other *evidence* contained in the record of this case, ultimately awarded the fifteen individual respondents herein compensatory damages in the aggregate sum of $2,738,888.40. Approximately $1,300,000 of these compensatory damages related to the actual losses that respondents sustained and incurred from September 1961 through December 1975 with respect to their condensate, extractable liquid hydrocarbons and plant products *and* approximately $1,400,000 of these compensatory damages related to the actual losses that respondents sustained and incurred with respect to their dry and residue gas from September 1961 through December 1975. With respect to the $1,400,000 in compensatory damages as awarded to respondents for the actual losses and damages attributable to their dry and residue gas from September 1961 through December 1975, approximately $1,000,000 of the losses were sustained and incurred from September 1961 through September 1972 and approximately $400,000 of these losses were sustained and incurred from October 1972 through December 1975.

After the Louisiana supreme court rendered its judgment herein on March 5, 1979 and denied Arkla's application for a

rehearing on April 9, 1979, the F.E.R.C. in reviewing the Louisiana supreme court's judgment of March 5, 1979 on April 25, 1979 issued an "*Order Requesting Additional Information To Supplement Record*" in order to obtain *all* of the relevant pleadings, evidence, and information necessary to perform its section 4 (d) "*review function*" and, thus, to verify and confirm that the compensatory damages as awarded to respondents for the actual losses attributable to their dry and residue gas for the period September 1961 through September 1972 were based upon and measured by "*contractually authorized*" prices, i.e. 11.7432¢ to 14.0508¢ per Mcf, which were *below* the Commission's established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the 1961 to 1972 period. Specifically, the F.E.R.C. in its "*Order*" dated April 25, 1979 (Appendix A to this brief) correctly noted and observed that:

> "To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.
>
> This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.
>
> (A) Hall, *et al.* to file with this Commission within ten days:
>
> (1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;
>
> (B) The parties to these proceedings to file with the Commission within ten days:
>
> (1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in

> damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana Courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; ..."

After both respondents and Arkla produced and provided true copies of the requested pleadings, evidence and information to the F.E.R.C., the F.E.R.C. by virtue of its "*Order*" dated May 18, 1979 performed its section 4 (d) "*review function*" with respect to respondents; "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 in order to fulfill its regulatory responsibility of protecting "*the relevant public interest*" against "*excessive prices*" for residue natural gas sold in interstate commerce from September 1961 through September 1972. The Commission in its "*Order*" dated May 18, 1979 correctly concluded and confirmed that:

> "The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical 'purchase,' 'seller,' or 'price.' The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause ...
>
> The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract ...
>
> As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a '[c]ommission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court.'

While we concur in the result reached by the FPC, we do not subscribe to its rationale ...

On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, 'Order Clarifying and Amplifying Commission Order Denying Rehearing' we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate ...

... [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness ...

The Louisiana Supreme Court, however, has awarded

damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972 ...

On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed. The Supreme court of Louisiana further stated:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction."

See Appendix B to this brief.

The F.P.C. on July 16, 1979 *denied* Arkla's petition for a rehearing with respect to its "*Order*" of May 18, 1979 (See: Appendix C to this brief).

Meanwhile, the F.E.R.C. in an "Amici Curiae Brief", as filed with this Court on June 3, 1979 in Docket No. 78-986, concluded and confirmed that:

"The complaints sought recovery under the provisions of private contracts. 'The rights as asserted by [respondents] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act 'expressly recognizes that rates to particular customers may be set by individual contracts,' *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its 'role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.' See also *United Gas Co. v. Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).

The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 884 (1968). However, absent adverse effects on the interests protected by the regulatory scheme — for example, prices in excess of established ceilings — the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4 (c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 673 (1950) ...

Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case ...

The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the

unbalancing of existing rate structures (*United States v. Radio Corporation of America, supra,* 358 U.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App. infra, 15a), there was no question concerning the reasonableness of the rates for the Commission to consider."

Consistent with the prior and correct determinations of the F.P.C., the Louisiana supreme court, and the F.E.R.C. with respect to the quantum of compensatory damages issue in this case, the Louisiana state court of appeal on January 22, 1980[21] again confirmed that:

"On the basic contract question (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas and for LHC products severed from its gas ...

The Supreme Court of Louisiana agreed and FERC so understood.

'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.'

Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5."

See: J.A. 72.

Moreover, the F.E.R.C. in the original edition of its "Order Denying [Respondents'] Application For Waiver of Filing Re-

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[21]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company,* 379 So.2d 1142 (La.App.2d 1980), J.A. 72.

quirements" dated November 5, 1980 again consistently confirmed that:

> "The rates (11.7432 cents per Mcf to 14.0508 cents per Mcf) would, however, be within the Commission ceilings in effect during that time ...
>
> We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group."[22]

Arkla, in continuing its efforts to escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets and profits for all of the actual losses and damages which it wrongfully caused respondents to sustain and incur from September 1961 through December 1975, filed three petitions for a writ of certiorari with this Court, i.e. Docket Nos. 78-986, 78-1789 and 79-1896.

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[22]The F.E.R.C. on November 6, 1980 issued an "*Errata Notice*" whereby it under the guise of a "printing error" deleted footnote 4 on page 2 of the original edition of this November 5, 1980, "*Order*" in its entirety, whereby F.E.R.C. had again confirmed that respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the 1961 to 1972 period.

Based upon principles of fundamental justice and the decisions of the courts in Plaquemines Oil and Gas Co. v. F.P.C., 450 F.2d 1334 (D.C. Cir. 1971), The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979) and numerous other cases, respondents timely perfected an appeal to the United States Fifth Circuit Court of Appeals in the proceeding captioned and styled "*Frank J. Hall, et al v. F.E.R.C.*," Docket No. 81-4011, whereby respondents have sought review and reversal of the F.E.R.C.'s "Order Denying Application for Waiver of Filing Requirements" dated November 5, 1980 and

Arkla, in its first petition for a writ of certiorari as filed with this Court on December 18, 1978 in Docket No. 78-986, asserted and specified two alleged errors with respect to the decisions rendered by the United States District Court for the Western District of Louisiana, the Louisiana state district court, the Federal Power Commission, the Louisiana state court of appeal, the Louisiana supreme court and the Federal Energy Regulatory Commission with respect to the jurisdictional issue and the liability and breach of contract issue presented in this case. In light of the specific circumstances of this case, the consistent and unanimous decisions of these six tribunals and the applicable and controlling cases,[23] this Court by virtue of an "*Order*" issued on October 1, 1979 properly *denied* Arkla's first petition for a writ of certiorari in Docket

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the F.E.R.C.'s "Errata Notice" dated November 6, 1980. Respondents' appeal is presently pending on the docket of the United States Fifth Circuit Court of Appeals. Arkla and the F.E.R.C. filed a "Joint Motion" seeking to have respondents' appeal transferred from the United States Fifth Circuit Court of Appeals to the United States Court of Appeals for the District of Columbia Circuit. That motion was *denied* on March 13, 1981.

[23]Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corporation, 350 U.S. 332 (1956); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); International Paper Co. v. F.P.C., 476 F.2d 121 (5th Cir. 1973); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974); Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569

No. 78-986. See: 444 U.S. 878 (1979). Subsequently, Arkla, in connection with its two specifications of alleged error relating to the jurisdictional issue *and* the liability and breach of contract issue as asserted in its first petition in Docket No. 78-986, filed a petition for rehearing with this Court on May 30, 1980. This Court by virtue of an "*Order*" issued on July 2, 1980 properly *denied* Arkla's petition for rehearing in Docket No. 78-986.

In connection with the quantum of compensatory damages issue as adjudicated by the courts below in this private breach of contract case on the basis of the "*severable prices*" that Arkla paid the United States government from 1961 to 1975 and the F.P.C.'s clarifying "*Order*" dated November 8, 1976 (Ex. D-59, J.A. 183), Arkla filed a second petition for a writ of certiorari with this Court on May 29, 1979 in Docket No. 78-1789 (the instant proceeding) whereby Arkla sought to have this Court reduce the quantum of compensatory damages awarded to respondents from approximately $2,700,000 to $1,700,000 based upon the unconscionable "*Catch-22*" contention that under our American System of Justice respondents may not recover compensatory damages out of Arkla's *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for the actual losses and damages (approximately $1,000,000) which Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 *because* Arkla through its *own* continued breach of contract for 14 years *and* its *own* uncooperative and effective withholding of all of the true facts from respondents from 1961 to 1975 wrongfully *prevented* and *precluded* respondents from having the information necessary

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(7th Cir. 1971); Phillips Petroleum Co. v. F.P.C., 349 F.2d 535 (10th Cir. 1965); Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); Merle M. Rowan v. Allied Chemical Corp., 39 F.P.C. 64 (1968), "Order" issued January 17, 1968.

to timely prepare and prospectively file routine notices setting forth their *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas under the private 1952 *"favored nations"* contract with the F.P.C. pursuant to section 4 (d) of the Natural Gas Act for the limited period September 1961 through September 1972. This Court on January 19, 1981 *granted* certiorari in Docket No. 78-1789.

Arkla, in an alternative effort to reduce the quantum of compensatory damages awarded to respondents by the courts below from approximately $2,700,000 to $2,400,000, filed a third petition for a writ of certiorari with this Court on May 30, 1980 in Docket No. 79-1896. Arkla, in its third petition for a writ of certiorari, Docket No. 79-1896, has reasserted the same contentions that were set forth in its first petition for a writ of certiorari in Docket No. 78-986 (see pp. 22 & 23 of its "Original Petition" dated December 18, 1978) and in its petition for rehearing in Docket No. 78-986 dated May 30, 1980 (see pp. 17 & 18 of its petition for rehearing) concerning a *"contractual determination"* that was also properly deferred by the F.P.C. (see F.P.C. *"Order"* dated November 8, 1976, Ex. D-59, J.A. 183, 184 & 185) to the Louisiana courts and was also properly resolved by the Louisiana courts with respect to respondents' *"contractual entitlement"* to the same *"favored nations"* treatment and the same *"severable prices"* that Arkla granted to the United States government for the government's condensate, extractable liquid hydrocarbons and plant products severed from its royalty gas. This Court has not yet acted on Arkla's third petition for a writ of certiorari in Docket No. 79-1896.

III.

SUMMARY OF ARGUMENT

1.

In light of the evidence contained in the record of this case and consistent with well established principles of fundamental

American justice, Arkla (the uncooperative and defaulting wrongdoer in this case) and its *own* private stockholders must, like all other uncooperative and defaulting pipeline companies and their private stockholders, separately and independently bear the legal and financial responsibility for all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from 1961 to 1975 due to Arkla's *own* continued breach of contract for 14 years and Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975.[24]

2.

Contrary to Arkla's wholly erroneous and self-serving contentions in this proceeding, the "*integrity*" of respondents' fundamental and traditional contract rights to independently recover compensatory damages out of Arkla's *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 "*do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas*".[25]

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[24] See: Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975). See, also: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code.

[25] See: Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); United Gas Pipe Line Company v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum

3.

In light of the evidence contained in the record of this case and consistent with well established principles of fundamental American justice, Arkla, the uncooperative and defaulting wrongdoer in this private breach of contract case, is clearly "*estopped*" from legally relying upon and unjustly taking advantage of its own continued breach of contract from September 1961 through December 1975 and its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from September 1961 to December 1975 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant corporate assets and profits for all of the actual losses and damages that it had wrongfully caused respondents to sustain and incur with respect to their dry and residue natural gas from September 1961 through September 1972.[26]

Corp. v. Superior Court, 366 U.S. 656 (1961); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and certiorari denied, 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974).

[26]See: United States v. Peck, 102 U.S. 64 (1880); Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555 (1931); R. H. Stearns Co. v. United States, 291 U.S. 54 (1934); Dietrick v. Greaney, 309 U.S. 190 (1940); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975); Ammerman v. Miller, 488 F.2d 1285 (D.C. Cir. 1973); Perrin v. Rodriguez, 153 So. 555 (La. 1934); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla.

4.

As confirmed by the court in *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976):

> "In the Oklahoma suit Western's claim was for breach of contractual obligations ... Although passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability ...
>
> To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages ... the Oklahoma courts and the FPC were confronted with separate and distinct issues — the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it ...
>
> In its 18 March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities' separate and independent obligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts) ..."

In light of the consistent and definitive determinations of

1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); George W. Garig Transfer v. Harris, 75 So.2d 27 (La.S.Ct. 1954). See, also: Article 2040 of the Louisiana Civil Code; Restatement of Contracts, §§294 and 295 (1932); 5 S. Williston, Contracts, §677 (3d ed. 1961); 17A C.J.S. Contracts, §468a and b (1963); Corbin on Contracts, §1266. (1951 ed.).

the F.P.C.,[27] the Louisiana courts,[28] and the F.E.R.C.[29] in connection with the quantum of compensatory damages issue in this private breach of contract case and respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972, it is clear beyond dispute that Arkla's separate and independent corporation obligation to respond in compensatory damages out of its own abundant private corporate assets and profits for its violation of private contract rights does *not* in any way present or involve any question concerning the Commission's regulatory responsibility to protect consumers from "*excessive,*" "*unjust*" or "*unreasonable*" rates for dry and residue natural gas sold in interstate commerce. In connection with this private breach of contract case, the Commission has fulfilled its substantive regulatory purpose under section 4 (d) of the Natural Gas Act by "*reviewing*" respondents' recovery of compensatory damages measured by "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 in order to fully protect consumers from "*excessive, unjust and unreasonable prices*" for dry and residue natural gas sold in interstate commerce from 1961 to 1972.

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[27]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "*Orders*" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[28]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, La., "Judgment" rendered on October 14, 1977, J.A. 7, 19

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51, 62.

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 379 So.2d 1142 (La.App.2d 1980), J.A. 72, 83.

[29]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "*Orders*" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively. See: Appendices A, B & C to this brief.

IV.

ARGUMENT

1.

In connection with the instant private breach of contract case, Arkla, respondents and the courts below have after more than 6 years of litigation independently determined that respondents have sustained actual losses and damages with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas of at least \$2,700,000 to "*a maximum of \$3,500,000*" due to Arkla's continued breach and violation of the private 1952 "*favored nations*" contract from September 1961 through December 1975 and Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 through 1975.

Just as the courts properly required the Kerr-McGee Corporation,[30] Cities Service Gas Company,[31] and the Louisiana-Nevada Transit Company,[32] as defaulting and uncooperative pipeline companies, to separately and independently respond in compensatory damages out of their *own* abundant private corporate assets and profits for all of the actual losses and damages wrongfully caused by their uncooperative breaches and violations of similar private gas sales contracts, the Louisiana supreme court below by applying well established principles of fundamental American justice to the evidence in this case properly required Arkla, the uncooperative and

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[30]See: Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971).

[31]See: Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972) and Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. 1976).

[32]See: Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975).

defaulting pipeline company in this case, to separately and independently respond in compensatory damages out of its *own* abundant private corporate assets and profits of all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from 1961 through 1975 due to its continued breach of contract for 14 years and its uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975.

It is a well established principle of fundamental American justice that an award of compensatory damages for losses caused by the breach and violation of a contractual agreement must be sufficient to "*place the injured party, as near as may be possible, in the same situation he would have occupied if the wrong had not been commited.*" [33] Arkla's separate and independent payment of compensatory damages out of its *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for respondents' actual losses and damages in this case will do nothing more than justly compensate respondents for their actual losses and damages and only slightly reduce the amount of cash dividends received by Arkla's private stockholders in any one year (which cash dividends now exceed $30,000,000 each year). Again, as Arkla independently disclosed and correctly confirmed to the Federal Securities and Exchange Commission

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[33]See: Wicker v. Hoppock, 73 U.S. 752 (1867); Globe Refining Co. v. Londa Cotton Oil Co., 190 U.S. 1171 (1903); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 407 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. 1976); Louisiana-Nevada Transit Co. v. Woods, 393 F. Supp. 177 (W.D. Ark. 1975). See, also: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code; 25 C.J.S., Damages, §74, p.843; and McCormick on Damages, §137, P.560.

in connection with this private breach of contract case on August 19, 1975:

> "The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company ... It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000 ... [i]t is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects ..." See: Ex. P-192, J.A. 155.

2.

Contrary to Arkla's wholly erroneous and obviously self-serving contentions in this proceeding, respondents' basic and fundamental civil law contract rights to independently recover compensatory damages out of Arkla's *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 *"do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas."*[34]

The principle that the Natural Gas Act did *not* destroy the *"integrity"* and *"stability"* of private contractual agreements *or* relieve and shield uncooperative and defaulting pipeline companies from their separate and independent corporate obligation to respond in compensatory damages out of their own abundant private corporate assets and profits for the actual losses and damages caused and occasioned as a result of their breach and violation of their private gas sales contracts has heretofore been consistently recognized and confirmed by this Court, to wit:

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[34]See: Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 663 (1961).

A. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950):

"If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

B. *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956):

"In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such ...

... By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry ... The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other ..."

C. *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958):

"It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake ... This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, c.f. Federal Power Com. v. Hope Natural Gas Co., 320 US 591, 603, 88 L.ed 333, 345, 64 S.Ct. 281, and we think that it did so ... by preserving the 'integrity' of private contractual arrangements for the supply of natural gas."

D. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961):

"Suit was brought in a state court on a common-law contract claim ... The rights as asserted by Cities Service are

> traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas ...
>
> We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated. Affirmed."

In light of the applicable and controlling decisions of this Court, the principle that the Natural Gas Act was *never* intended by Congress to destroy the *"integrity"* and *"stability"* of private contractual agreements *or* to shield uncooperative and defaulting pipeline companies from their separate and independent corporate obligation to respond in compensatory damages out of their *own* abundant private corporate assets and profits for the actual losses and damages caused and occasioned as a result of their breach and violation of their private gas sales contracts has also heretofore been consistently recognized and correctly confirmed by all other courts of this Nation. See: *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 566 (8th Cir. 1962); *Monsanto Co. v. F.P.C.*, 463 F.2d 799 (D.C. Cir. 1972); *Skelly Oil Co. v. F.P.C.*, 532 F.2d 177 (10th Cir. 1976); *Shell Oil Co. v. F.P.C.*, 531 F.2d 1324 (5th Cir. 1976); *State of Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974); *City of New Orleans, La. v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D.La. 1974).

In light of the applicable and controlling decisions of this Court and all other courts of this Nation on this well established point, the F.E.R.C. and the United States, in an "Amici Curiae Brief" filed with this Court on June 3, 1979 in connection with this private breach of contract case in Docket No.

78-986 at pages 11, 12, 15 and 16, again consistently concluded and correctly confirmed that:

> "The complaints sought recovery under the provisions of private contracts. 'The rights as asserted by [respondents] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act 'expressly recognizes that rates to particular customers may be set by individual contracts,' *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its 'role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.' See also *United Gas Co. v. Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).
>
> The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme — for example, prices in excess of established ceilings — the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 673 (1950) ...
>
> The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States v.*

> *Radio Corporation of America, supra*, 358 U.S. at 348), no such issues were presented.
>
> Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...
>
> Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App., *infra*, 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider."

3.

In light of Arkla's continued breach and violation of respondents' private legal and contractual "*favored nations*" rights from September 1961 through December 1975, Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975 and well established principles of fundamental American justice, Arkla, as determined by the Louisiana supreme court below, is unquestionably "estopped" from legally relying upon and unjustly taking advantage of its *own* continued breach and violation of respondents' legal and contractual rights for 14 years and its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant corporate assets and profits for all of the actual losses and damages that it wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 to September 1972. Under basic principles of "*estoppel*" and fundamental justice, Arkla, the defaulting wrongdoer in this breach of contract case that uncooperatively and effectively rendered it absolutely *impossible* for respondents to timely prepare and file routine notices setting forth their "*contractual entitlement*" to 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas with the F.P.C.

pursuant to section 4(d) of the Natural Gas Act from September 1961 to September 1972, is unquestionably "*estopped*" from unilaterally evading and escaping its *own* separate and independent contractual obligation to bear the legal and financial responsibility for all of respondents' actual losses and damages incurred with respect to their dry and residue gas from 1961 to 1972 out of its *own* abundant private corporate assets and profits.

In consistently applying and enforcing fundamental principles of "*estoppel*" against other defaulting contractual obligors that have wrongfully caused injuries and damages by breaching and violating private contractual agreements, this Court has heretofore repeatedly held that:

A. *United States v. Peck*, 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance ... It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

B. *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555 (1931):

> "As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .
>
> > '... And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'
>
> ... [i]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

C. *R. H. Stearns Co. v. United States*, 291 U.S. 54 (1934):

> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this

is your own act, and therefore you are not damnified." ' Dolan v. Rodgers, 149 N.Y. 489, 491; 44 N.E. 167; and Imperator Realty Co. v. Tull, 228 N.Y. 447, 457; 127 N.E. 263; quoting West v. Blakeway, 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

D. *Dietrick v. Greaney*, 309 U.S. 190 (1940):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L.Ed 876, 882, 45 S.Ct. 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648 71 L ed 1270, 1278, 47 S Ct. 714."

E. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946):

"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. v. Sealright Co. (CCA 2d) 141 F2d 972, 979. That principle is an ancient one, Amory v. Delamirie, 1 Strange 505, 93 Eng. Reprint 664, and is not restricted to proof of damage in antitrust suits..."[35]

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[35]See, also: Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975); Ammerman v. Miller, 488 F.2d 1285 (D.C. Cir. 1973); Perrin v. Rodriguez, 153 So. 555 (La. 1934); Whitfield Cons. Co., Inc. v.

Contrary to Arkla's obviously erroneous and self-serving contentions in this proceeding with respect to the applicable principles of *"estoppel"*, these same basic principles of fundamental justice have heretofore been properly and consistently applied by other courts, like the Louisiana supreme court below in this case, in order to effectuate *basic justice* in other cases involving similar breaches and violations of private gas sales contracts covering the sale of residue natural gas in interstate commerce. See: *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); and *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976).

Certainly, in light of basic principles of *"estoppel"* and fundamental justice, Arkla's continued breach of contract for 14 years and Arkla's uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975 constitutes *"a valid legal excuse"* for respondents' inability to timely prepare and file routine section 4(d) notices with the F.P.C. from 1961 to 1972 setting forth their *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per

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Commercial Devel. Corp., 392 F.Supp. 982 (1975); Watson Bros. Transportation Co. v. Jaffa, 143 F.2d 340 (8th Cir. 1944); Gridiron Steel v. Jones & Laughlin Steel Corp., 361 F.2d 791 (6th Cir. 1966); George W. Garig Transfer v. Harris, 75 So.2d 27 (La.S.Ct. 1954); Cox v. Department of Highways, 209 So.2d 9 (La.S.Ct. 1968); Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code; C.J.S., 17A, Contracts, §328, pp. 284-287, and Notes 40.5 and 41; C.J.S., 17A Contracts, §468(a) and (b), pp. 645-647; C.J.S., 17A, Contracts, §469, p.647; Restatement of Contracts, §302 (1932); Restatement of the Law of Contracts, §329; 3A Corbin on Contracts, §748 (1960); 3 Corbin, Contracts, §568, pp. 331-334 (1960); Corbin on Contracts, §§1029 and 1088; 5 Williston, Contracts, §§670, 677 (3rd ed. 1961); 11 Williston on Contracts, §§1296, 1316 (3d ed. 1968); 3 Williston on 'Sales', §599, p.293; and Summers, The Law of Oil & Gas, §§434 and 435.

Mcf for their dry and residue gas, which "*severable*" and "*contractually authorized*" prices were based upon the same "*severable prices*" that Arkla paid to the United States government for the government's dry and residue gas produced from the same Sligo Gas Field from 1961 to 1972 and were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the 1961 to 1972 period. Clearly, our laws and our American System of Justice still function to protect innocent and injured citizens from losses and damages caused by the wrongful acts and omissions of their uncooperative and defaulting contractual obligors.

4.

As heretofore consistently and correctly confirmed by the F.P.C., the Louisiana supreme court, the F.E.R.C.'s staff counsel and the F.E.R.C. itself, this private breach of contract case involves Arkla's separate and independent corporate obligation to respond in compensatory damages out of Arkla's *own* private corporate assets and profits for losses and damages caused by Arkla's continued breach and violation of respondents' private legal and contractual rights for 14 years; just as the Kerr-McGee Corporation, Cities Service Gas Company and the Louisiana-Nevada Transit Company had to ultimately honor their separate and independent corporate obligation to respond in compensatory damages out of their private corporate assets and profits for losses and damages caused by their uncooperative breaches and violations of private legal and contractual rights under similar private gas supply agreements. See: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

As heretofore consistently and correctly confirmed by the

F.P.C., the Louisiana supreme court, the F.E.R.C's staff counsel and the F.E.R.C. itself in connection with this private breach of contract case, this case does *not* present or involve any question concerning the Commission's substantive regulatory responsibility to protect consumers against "*excessive,*" "*unjust*" or "*unreasonable*" prices for dry and residue natural gas sold in interstate commerce. From 1961 through 1975, the F.P.C. adopted, approved and established "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of dry and residue natural gas as produced from North Louisiana and sold ir interstate commerce in order to fully protect consumers from "*excessive, unjust and unreasonable prices*" for dry and residue gas sold in interstate commerce.[36] In the proceedings that led to the F.P.C.'s adoption and establishment of these "*maximum, lawful, just and reasonable area rate ceilings*", the F.P.C. fully considered all factors affecting "*the relevant public interest*" against "*excessive prices*" for dry and residue natural gas sold in interstate commerce.[37] The appropriateness of the determinations of the F.P.C. in this regard has *never* been an issue in this private breach of contract case.

The "*maximum, lawful, just and reasonable area rate ceiling*" established by the F.P.C. in 1961 was 14¢ per Mcf at 15.025 p.s.i.a. (24 F.P.C. 818). This "*maximum, lawful, just and reasonable area rate ceiling*" was superceded by the F.P.C.'s "*Other Southwest Area Rate Order Nos. 607 and 607-A*" (18 C.F.R. §§154.109 and 154.109a), which, as confirmed at respondents' request by the F.P.C. on November 8, 1976 in connection with this private breach of contract case (Ex. D-59, J.A. 183), established the following "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of

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[36]See: "*Statement of General Policy 61-1*", 24 F.P.C. 818 and "*Other Southwest Area Rate Order Nos. 607 and 607-A*", 18 C.F.R. §§154.109 and 154.109a.

[37]See: *Other Southwest Area Rate Case* (OSWA I), 484 F.2d 469 (5th Cir. 1973).

dry and residue natural gas in interstate commerce as produced from North Louisiana:

Prior to January 1, 1965	From Jan. 1, 1965 thru Sept. 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Based upon the "*severable prices*" that Arkla paid to the United States government for the government's dry and residue gas from 1961 to 1972 (see Ex. P-82, J.A. 146), the courts below consistently concluded that respondents were "*contractually entitled*" to receive and should have received the following "*contractually authorized*" prices for their dry and residue gas from 1961 to 1972:

Sept. 1961 through Dec. 1961	Jan. 1962 through Dec. 1966	From Jan. 1, 1967
11.7432¢ per Mcf	13.0252¢ per Mcf	14.0508¢ per Mcf

Had Arkla timely and cooperatively informed respondents of the actual prices that Arkla was in fact paying to the United States government for the government's dry and residue natural gas as produced from the same Sligo Gas Field from 1961 to 1972, i.e. 11.7432¢ to 14.0508¢ per Mcf, and had Arkla timely and cooperatively assisted respondents in preparing and filing the routine section 4(d) notices setting forth their "contractually authorized" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas with the F.P.C. from 1961 to 1972, as Arkla was legally and contractually obliged to do,[38] these are the F.P.C.'s "*maximum, lawful, just and reasonable area rate ceilings*" that "*would*" have governed the "*severable prices*" respondents were "*contractually entitled*" to receive for their dry and residue gas under the private 1952 "*favored nations*" contract with Arkla from 1961 to 1972.

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[38]See: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code. See, also Arkla's own "*Internal Memorandums*", Ex. P-176, J.A. 152 and Ex. P-177, J.A. 153.

In connection with this private breach of contract case, the point that respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" has heretofore been consistently recognized and correctly confirmed by the F.P.C.,[39] the Louisiana supreme court,[40] the F.E.R.C.'s staff counsel and the F.E.R.C. itself.[41]

After the F.P.C. issued its clarification "*Order*" dated November 8, 1976 (Ex. D-59, J.A. 183), and again deferred the resolution and adjudication of this private breach of contract case to the Louisiana courts, the F.E.R.C.'s staff counsel in a "Memorandum Brief" dated August 23, 1978 correctly concluded and confirmed that:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court ...

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[39]See: *Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "*Orders*" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[40]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.d 984 (La.S.Ct. 1979), J.A. 51.

[41]See: *Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "*Orders*" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively, Appendices A, B & C to this brief.

Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246 (1951), is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved."

The Louisiana supreme court on March 5, 1979 consistently confirmed that:

"We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues ...

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the different between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). . .

At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and if proper filing procedures had been followed (D-59). The Commission clearly indicated in its order that it would have approved such rates ...

We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission." See: J.A. 51.

After the Louisiana supreme court rendered its judgment of March 5, 1979 and denied Arkla's petition for rehearing on

April 9, 1979, the F.E.R.C. in order to perform its section 4(d) "*review function*" with respect to respondents' recovery of compensatory damages measured in part by their "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 issued an "Order" on April 25, 1979 (see Appendix A to this brief). By means of its "*Order*" dated April 25, 1979, the F.E.R.C. obtained from respondents and Arkla all of the pleadings, evidence and summaries necessary for its performance of its section 4(d) "*review function*".

On May 18, 1979, the F.E.R.C. issued an "*Order*" (Appendix B to this brief) correctly setting forth the results of its performance of its section 4(d) "*review function*", to wit:

> "The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract ...
>
> On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons ...
>
> The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate ...
>
> ... [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness ...
>
> On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it

considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction."

See: Appendix B to this brief.

In light of the Commission's *"Orders"* of November 8, 1976, April 25, 1979 and May 18, 1979, respectively, and the F.E.R.C.'s review of all of the judgments rendered by the Louisiana courts below (including a review of the pleadings and evidence contained in the record of the private breach of contract case), the F.E.R.C. and the United States, in their "Amici Curiae Brief" as filed with this Court in Docket No. 78-986 on June 3, 1979 at pp. 15 and 16, correctly and consistently confirmed that:

"The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States v. Radio Corporation of America, supra*, 358 U.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Com-

mission applicable area ceilings (App., *infra*, 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider."

Consistent with the prior and correct determinations of the F.P.C., the Louisiana supreme court and the F.E.R.C. with respect to the quantum of compensatory damages issue in this breach of contract case, the Louisiana state court of appeal on January 22, 1980[42] reconfirmed that:

> "On the basic contract question (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas and for LHC products severed from its gas ...
>
> The Supreme Court of Louisiana agreed and FERC so understood.
>
>> 'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.'
>>
>> Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5."
>
> See: J.A. 72.

Again, on the basis of the Commission's "*Orders*" dated November 8, 1976, April 25, 1979, May 18, 1979 and July 16, 1979, and the Louisiana supreme court's judgment of March 5, 1979, the F.E.R.C. on November 5, 1980 again consistently confirmed that:

> "The rates (11.7432 cents per Mcf to 14.0508 cents per Mcf) would, however, be within the Commission ceilings in effect during that time ...

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[42]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980), J.A. 72.

> We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group."[43]

In light of the consistent and definitive determinations of the F.P.C., the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.E.R.C.'s staff counsel, and the F.E.R.C. itself in connection with the quantum of compensatory damages issue in the instant private breach of contract case, it has been conclusively established that respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were always well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of dry and residue gas produced from North Louisiana and sold in interstate commerce from 1961 to 1972. Therefore, it is clear beyond dispute that the quantum of compensatory damages issue in this private breach of contract case does *not* in any way involve a question concerning the Commission's regulatory responsibility to protect consumers from "*excessive*," "*unjust*" or "*unreasonable*" rates for dry and residue gas sold in interstate commerce from 1961 to 1972.

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[43]See the discussion as set forth in footnote 22 on page 23 of this brief.

V.

CONCLUSION

Respondents respectfully submit that in the interest of basic and fundamental justice with respect to all of the actual losses and damages that Arkla wrongfully caused them to sustain and incur from September 1961 through December 1975, the judgment of the Louisiana supreme court below dated March 5, 1979 should be *affirmed.*

Moreover, respondents respectfully submit that this Court in *affirming* the judgment of the Louisiana supreme court below should once again remind Arkla that it, like all other contractual obligors, *must* timely honor and cooperatively fulfill its private contractual agreements *or* in default thereof be prepared to separately and independently respond in compensatory damages out of its *own* abundant private corporate assets and profits for all losses and damages occasioned by its breach and violation of its private contractual agreements.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

April 1, 1981

APPENDIX

APPENDIX TO
RESPONDENTS' BRIEF ON THE MERITS

Contents: **Page**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and
George R. Hall.

Arkansas Louisiana Gas Company v. Frank J. Hall, *et al.*	Docket No. RI76-28

ORDER REQUESTING ADDITIONAL INFORMATION TO SUPPLEMENT RECORD

(Issued April 25, 1979)

To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.

The Supreme Court of Louisiana stated in an opinion in a parallel case[1] that:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

The trial court in Louisiana stated.[2]

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[1]*Frank J. Hall, et al.* v. *Arkansas-Louisiana Gas Company*, No. 62,560, March 5, 1979, p. 12, n. 7.

[2]*Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court Caddo County, Louisiana; No. 225,699, October 14, 1977.

> The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate ...

This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.

The Commission therefore orders:

(A) Hall *et al.* to file with this Commission within ten days:

(1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;

(B) The parties to these proceedings to file with the Commission within ten days:

(1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; and

(2) The parties should at the time of filing the data with this Commission serve each other with copies of this data. If the summaries of evidence do not agree the

parties are directed to file comments on any disagreements within 5 days.

By the Commission. Commissioner Smith voted present.

(S E A L)

Kenneth F. Plumb,
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PRIMARY JURISDICTION

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr., and George R. Hall.

Arkansas Louisiana Gas Company	)	
	)	Docket
v.	)	No. RI76-28
	)	
Frank F. Hall, *et al.*	)	

ORDER DECLINING JURISDICTION AFTER RECONSIDERATION OF THE ISSUE ON REMAND

(Issued May 18, 1979)

I

A QUESTION OF JURISDICTION

In this case this Commission[1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to determine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation

[1]These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the FPC, when used otherwise, to the FERC.

clause" in a gas supply contract between the utility and certain independent producers of gas?[2]

II

HISTORY OF PROCEEDINGS

A. The Parties

Frank J. Hall, *et al.* are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractural provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. The State Court Proceedings

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court[3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement with the government had triggered the most

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[2]*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4-5.

[3]*Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana. Second Circuit,[4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the United States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party seller."[5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[6] Arkla has petitioned the Supreme Court of the United States for certiorari.

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[4]*Hall* v. *Arkansas-Louisiana Gas Company*. 359 So.2d 255 (May 1, 1978).

[5]The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> ... in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporaton* v. *Federal Power Commission*, 149 U.S. App. D.C. 310, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32L.Ed.2d 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6]A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of con-

C. Action Before the FPC

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC[7] held:

> There is no question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * *
>
> However, there is a threshold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court ***. This case presents a question of concurrent jurisdiction *** While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the Court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled[8] that even if the state court held that the Hall group was entitled to a higher rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the Commission's regulations. The FPC also noted that

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sidering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

[7] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976). In these proceedings, the FPC issued other orders which are not relevant at this time.

since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. Actions By The FERC

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[9] the Commission asked for briefs directed towards the question of

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]ommission policy to defer

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[9]*Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

action on contract questions presented to it involving jurisdictional sales which are pending in state court."[10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement." While there are circumstances where the interpretation of a favored nation clause may involve this Commission's technical expertise,[11] we

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[10]Order Denying Petition (March 8, 1976) p. 3.

[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from another party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need for uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests,"[13] and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the favored nation clause. In the circumstances of this case

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[12]See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343-344 (1956); *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 109-110, 112-114 (1958).

[13]*Permian Basis Area Rate Cases*, 390 U.S. 747, 784 (1968).

whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale", it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case. This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing."[16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group

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[14]The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3

[15]This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce for resale." Section 1(b) of the Natural Gas Act, 52 Stat. 821 15 U.S.C. 717(b).

[16]*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

were entered into long before this Commission became actively concerned with the indefinite price escalation clauses, and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nationl clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

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[17] 18 C.F.R. 154.93.

[18] The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 C.F.R. 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored-nation clause. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small pro-

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana Supreme Court

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ducer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, up to applicable limits provided by the Commission for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2, n. 1:

> Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a write of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

[19]On April 25, 1979, we issued an "Order requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this

concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme court of Louisiana further stated:

Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

[20]As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

[21]*Frank J. Hall* v. *Arkansas Louisiana Gas Company*, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Application For Rehearing*, (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976).

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

By the Commission

(S E A L)

Kenneth F. Plumb,
Secretary

[22]Supreme Court of Louisiana, slip op. p. 12, n. 7.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., and George R. Hall.

Arkansas Louisiana Gas Company	)	Docket
	)	No. RI76-28
v.	)	
	)	
Frank J. Hall, *et al.*	)	

ORDER DENYING REHEARING

(Issued July 16, 1979)

On May 18, 1979, this Commission issued an "Order Declining Jurisdiction After Reconsideration of the Issue on Remand." Applications for rehearing and reconsideration of that order have been received from all parties in this proceeding. Those applications are denied.

The Commission has also received an application for waiver of Section 4(d) of the Natural Gas Act. The application for waiver will be dealt with in a separate order. This denial for rehearing does not affect or prejudge the application for waiver.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

PETITIONER'S REPLY BRIEF ON THE MERITS

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April 10, 1981

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 78-1789

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PETITIONER'S REPLY BRIEF ON THE MERITS

I. REPLY TO RESPONDENTS' BRIEF

Respondents in their brief propose two questions (p. ii), neither of which adresses the questions presented by Petitioner's application and brief. As far as we can understand Respondents' questions and argument, it appears that Respondents are asking the Court to permit them to secure an increase in rates without any consideration of the effect of the *Natural Gas Act,* 15 U.S.C. §§ 717, *et seq.,* on the contractual

relations of the parties.[1] Respondents' argument is instead a litany of legally irrelevant statements embellished by rhetoric, some exaggerated and some even untrue, all designed to evoke undeserved sympathy for the Respondents' cause. Respondents' brief discloses no ground upon which the judgment of the court below can be sustained.

We have concluded that we should analyze the Respondents' arguments to point out their defects in at least the following respects:

(1) Respondents' assertions that Petitioner purchased gas from the United States government (Respondents' brief, pp. 4, 9, 10, 41, 43).

(2) Respondents' claim that the facts were wrongfully withheld from them (Respondents' brief, pp. 4, 5, 10, 25, 27, 28, 31, 32, 37, 40, 43).

(3) Respondents' assertion that any recovery by them would be paid out of Petitioner's "abundant corporate assets" (Respondents' brief, pp. 5, 6, 7, 23, 25, 27-28, 30, 31, 32, 33, 41).

(4) Respondents' assertion as to what the Commission and the courts had held as to the jurisdiction of the Louisiana courts (Respondents' brief, pp. 4, 14).

(5) Respondents' assertions as to quantum of recovery (Respondents' brief, pp. 15, 16 *et seq.*, 18 *et seq.*, 22, 25, 41, 49).

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[1] One of Respondents' questions does include a reference to the amount of the recovery, a question involved in the grant of *certiorari*.

(6) Case authority relied on by Respondents is inapposite.

We will discuss the above-enumerated features of Respondents' argument and in Part II will respond to the brief *amicus curiae* filed by Atlantic Richfield Company ("Atlantic").

(1) Petitioner Bought No Gas From The United States Government.

Respondents repeatedly refer to "prices paid to the United States government for the government's . . . gas," or similar language.

Contrary to Respondents' assertions, the Louisiana Court of Appeal, reversing the trial court, held as follows (J.A. 36):

> "We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. [citing cases] We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

The Supreme Court of Louisiana refused to review this decision of the Court of Appeal (J.A. 50, 57, n. 4). So far as concerns the decisions of the Louisiana courts, it is finally settled that Petitioner did not buy any gas from the United States government. Rather, the Louisiana courts concluded that the phrase "purchase from another party seller" should be "broadly construed" in the interest of seller to be activated by the payment of rent royalty (J.A. 35-38), erroneously relying upon *Eastern Petroleum Corp.* v. *Kerr-McGee*

Corp., 447 F.2d 569 (7th Cir. 1971), discussed *infra* pp. 12-13.

(2) Petitioner Withheld No Facts As To Triggering From Respondents.

Respondents' assertions that Petitioner withheld facts regarding the triggering of the favored nation provision are based on their assumption that Petitioner knew, when it commenced payment of royalties to the government in 1961, that such payment of royalties triggered the favored nation provision. No evidence supports this assumption. Petitioner could not have known in 1961 that the Louisiana Court of Appeal in 1978 would construe the term "purchase" in a fashion inconsistent with its commonly accepted meaning.

The fact is that while representatives of Petitioner were negotiating in 1961 and 1962 with officials of the government as to the value of the gas for purposes of royalty settlement, Petitioner requested of its counsel answers to a number of questions regarding Petitioner's rights in such negotiations with the government, including an opinion regarding the question of whether rent royalties would trigger the favored nation provision. Counsel responded in a memorandum, the last paragraph of which stated (Def. Ex. D-6, R 2708):

> "Answering your final question as to the effect of such royalty payments by the Arkansas Company, I do not see how it could have any effect on settlements under fixed price leases. It would not be finally determinative under market value leases; but it could be one circumstance that would tend to show a higher market price in the field and thus might have an influence on royalty terms

> under such leases. *In my judgment, it would have no effect in the way of triggering any favored nations increases."* [Emphasis added.]

Respondents testified that one or more of them asked representatives of Petitioner whether it was "buying" gas at a higher price than under the contract involved here. The answer was in the negative, as it should have been based on counsel's legal opinion. We say with complete confidence that the evidence that Petitioner denied that it was "buying," gas from the government was based on a good faith understanding that the payment of royalty did not constitute a purchase. It is significant in this connection that in its Order Denying Application for Waiver of Filing Requirements, issued November 5, 1980, the Commission found (App. 14a-15a):[2]

> "[O]ur own review of the record before us leads us to conclude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group."

Respondents insisted in the trial court, the Court of Appeal and the Supreme Court of Louisiana that Petitioner had concealed the facts from them. The trial court ignored this contention,[3] and the Louisiana Court of Appeal held (J.A. 41):

> "The trial court did not make a finding that defendant was guilty of fraudulent concealment, and

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[2] The order is attached to this Reply Brief as an Appendix.

[3] A contention not passed on is rejected under Louisiana law. *Villars v. Faivre*, 36 La.Ann. 398 (1884); *Soniat* v. *Whitmer*, 141 La. 235, 74 So. 916 (1917).

> we find the evidence is insufficient to support such an allegation."

The Louisiana Supreme Court held (J.A. 65):

> "The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct."

The findings of both the Commission and the Louisiana courts confirm that Petitioner acted in good faith and withheld no facts from Respondents.

(3) Respondents' Assertion That Any Recovery By Them Would Be Paid Out Of Petitioner's "Abundant Corporate Assets" Is Erroneous.

Respondents in at least 14 different parts of their brief have assured this Court that their recovery would be from Petitioner's "abundant corporate assets" and at the expense of its stockholders. They have never given any legal authority for the statement that this case would be different from all other cases of an increased price by a utility to a supplier where the rule is that a utility's rates are fixed in an amount which will permit it to recoup its expenses and receive a return on the value or cost of its assets devoted to the public service. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944).

Respondents' understanding in this respect appears to be directly in conflict with the position of the Solici-

tor General of the United States and the Commission, who say in their brief filed in this cause as *amici curiae* (pp. 15-16):

"Moreover, the Commission is not now in a position to make a post hoc determination regarding the reasonableness of the rates that respondents would have charged Arkla in the period between 1961 and 1972.[12] The Commission would, in any event, be precluded by Section 5(a) of the Act (15 U.S.C. 717d(a)) from approving retroactive ratemaking. Under this Court's decisions in *Montana-Dakota* and *T.I.M.E. Inc.,* the Louisiana courts are similarly precluded.

"This result is consistent with the statute's central purpose of benefitting consumers by holding down wholesale prices. The actual consumers of the gas, Arkla's past customers, have already paid for the gas, and any surcharges that Arkla may be permitted to levy in order to recover for the damages awarded to respondents would fall on a different group of customers. *Cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 254; *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 491 (Black, J., dissenting).

"[12] In its decision on respondents' waiver application, the Commission refused to speculate 'as to how our predecessors would have acted nineteen years ago' (Amici Supp. Mem. App. 15a)."

(4) Respondents' Statement That FERC And The Federal District Court Have Affirmed Jurisdiction Of The State Courts Is Erroneous.

In their "Statement of the Case," Respondents have averred (pp. 11, 14) that both the United States District Court for the Western District of Louisiana and

the Commission have held that the Louisiana state courts have jurisdiction over the interpretation of the contract between the parties.

Respondents are in error. What the federal district court held was that it did not have removal jurisdiction and what the Commission held was that it need not exercise jurisdiction because the filed rate doctrine barred the cause of action (App., p. 13a, n.19):

> "We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation."

The District Court opinion on removal is an illustration of "the well-pleaded complaint rule," formulated in *L. & N. R.R. Co.* v. *Mottley,* 211 U.S. 149 (1908), that jurisdiction must be determined on the face of the plaintiff's complaint. The District Court found that Respondents' complaint anticipated Petitioner's defenses under the *Natural Gas Act.* See Judge Rubin's opinion, J.A. 160, at 165. The opinion did not hold that the Commission was without jurisdiction, nor did it hold that the state court had jurisdiction.

(5) The Illegality Of The Quantum Of Recovery Permitted By The Court Below.

The Supreme Court of Louisiana (J.A. 62) and the Louisiana Court of Appeal (J.A. 44, 45) directed, in

remanding the case to the Louisiana district court for calculation of recovery, that the price of the gas be fixed at the amounts, per unit of gas, which Petitioner had paid to the United States as royalty, and that further adjustments be made in accordance with the contract provision requiring that "due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts."

The resulting judgment of the district court (J.A. 69), affirmed by the Louisiana Court of Appeal (J.A. 72), is for an amount per unit of gas at about twice the maximum rate permitted by the Commission; and is pending upon Petitioner's third petition to this Court for *certiorari* in No. 79-1896.

This judgment proves conclusively that the Louisiana courts are either not willing or not able to determine correctly the effect and applicability of the *Natural Gas Act* on the transaction before the Court in this case.

The question may be complicated, but not too complicated to be explained. Ordinarily, almost invariably, a natural gas well produces wet gas—gas containing liquefiable hydrocarbons—which by a relatively simple plant operation can be extracted from the gas (usually at an extraction plant) and sold separately as hydrocarbon liquids. A natural gas well also produces hydrocarbon liquids (usually called distillate or condensate) which drop from the gas in a separator at or near the wellhead. This was the situation as to the gas bought by Petitioner at the wellhead from Respondents in the Sligo Field and as to the gas produced by Petitioner under its lease from the federal government.

Petitioner's purchase contract with Respondents (J.A. 87 at page 91) contains the following provision:

> "Gas sold hereunder shall be delivered to Buyer, and title thereto shall pass to Buyer at the outlet side of Buyer's metering equipment located at or near each of the wells subject hereto."

It also contains in the price provision (J.A. 98, 99) a Section 8(B) which provides:

> "The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquefiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products . . . ."

A further provision of the contract (J.A. 100) gave Petitioner the right, but not the obligation, to purchase condensate or distillate that might be recovered at the well separator. Payment was to be made for such distillate as Petitioner purchased at prices prevailing from time to time. In the operation of the contract, some of the distillate was bought and some was not.

The royalty settlement with the United States government was provided by the lease contract as interpreted and applied by the United States Geological Survey (J.A. 121 at page 135) to require 16⅔ percent of the value of the liquid hydrocarbons extracted from the gas at Petitioner's Sligo gasoline plant, 16⅔ percent of the market value of the distillate, and 16⅔

percent of the market value of the gas remaining at the gasoline plant after extraction of liquefiable hydrocarbons.

The Louisiana courts have disregarded the *Natural Gas Act* and the pricing provisions of the contract and have thereby given the Respondents a retroactive rate increase which is about twice the maximum price fixed by the Commission for the gas involved.

The Louisiana Court of Appeal in its judgment pending on petition for *certiorari* in No. 79-1896 (J.A. 72, 78-81) recognized that the contract did in fact provide a wellhead price for the wet gas. Thus that price is the one that is governed by the Commission prescribed ceilings. Respondents have represented (Respondents' brief, pp. 47-49) that each of the Louisiana courts and the Commission have held that Respondents sold Petitioner hydrocarbon liquids and residue gas at severable prices. There is no such holding in the decisions of the Louisiana courts and the Commission has now retracted its erroneous statements relied on by Respondents in their brief served on March 30, 1981. The retraction is made in the brief of the Solicitor General and the Commission filed in No. 79-1896 as *amici curiae* and served on Respondents in November, 1980, p. 5:

> "Gas may be sold at the mouth of the well (the wellhead) or after the removal of liquids or other impurities at processing plants. At the wellhead, the Commission has jurisdiction over the entire gas stream, including those molecules later processed into liquids. See *Mobil Oil Corp.* v. *FPC,* 483 F.2d 1238, 1248 n. 23 (D.C. Cir. 1973), citing *Permian Basin Area Rate Cases,* 390 U.S. 747, 820 n. 111 (1968). With respect to sales at the plant,

however, once liquids have been extracted the Commission's authority extends only to the gas itself (*i.e.*, the residue gas).

"The Commission's previous conclusion (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a) that 'the damages does not exceed applicable area ceiling rates,' was premised upon the erroneous belief that Arkla's contract with respondents was based on sales at the plant, and not at the wellhead. As a result of this incorrect interpretation, the Commission eliminated from its calculations those damages that apparently represented payment for removable liquids, and found that the damages awarded for the actual gas (*i.e.*, residue gas) were within the area ceiling rates. That premise is now undermined by the ruling of the Louisiana courts (Pet. App. 116a-117a) that Arkla's contract with respondents provided for sales of the entire gas stream at the wellhead, including removable liquids."

(6) Case Authority Relied On By Respondents Is Inapposite.

Respondents in their brief rely heavily on two cases, *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.,* 447 F.2d 569 (7th Cir. 1971), and *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961).

A. *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.*

We feel that we should refer to the only case of which we are aware that construed the payment of a royalty under an oil and gas lease as triggering a favored nation provision. *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.,* 447 F.2d 569 (7th Cir. 1971). This case is cited by the Louisiana Court of Appeal (J.A. 37-38) and is relied on by Respondents, but is clearly distinguishable. *Kerr-McGee* involved the pricing of

intrastate helium gas sales and not interstate sales of natural gas for resale. Therefore, the case is totally inapposite with respect to this transaction which is governed by the *Natural Gas Act* and the Commission's regulations thereunder.

The *Kerr-McGee* court's interpretation of the contract was influenced by the fact that Arizona state law was unsettled on the issue of whether helium royalty payments involved a purchase. 447 F.2d at 573. Under the *Natural Gas Act,* it is a well-settled principle of federal regulatory law that a royalty payment does not constitute a purchase of natural gas (See Petitioner's Brief, p. 40, *et seq.*). The case is also factually distinguishable because the parties had previously interpreted their favored nation provision as being triggered by the payment of royalties and the clause explicitly referred to "leases." 447 F.2d at 570-71, n. 4.

B. *Pan American Petroleum Corp. v. Superior Court*

The basic question in *Pan American* was whether the pipeline's case should have been initiated in federal rather than state court. Since the plaintiff was seeking merely to be refunded excess payments above the established rate on file with the Commission, there was simply no statutory jurisdiction over the case in the federal courts. The case only involved the well-pleaded complaint rule of federal court jurisdiction. *Pan American* did *not* concern the determination of the level of rates at which natural gas could have been sold for resale in interstate commerce, which is the issue in the instant proceeding. *See Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.,* 299 F.2d 692 (5th Cir. 1962), *cert. denied,* 371 U.S. 887 (1962).

II. REPLY TO BRIEF OF ATLANTIC RICHFIELD AS *AMICUS CURIAE*

The attempt of Atlantic to distinguish the present case from this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951), is notably unsuccessful.

Atlantic, relying on the following excerpt from the *Montana-Dakota* opinion contends that the Court "recognized that had the Plaintiff brought its claim as a common law action in a court of competent jurisdiction, such an action would have been maintainable and the filed rate doctrine would have posed no problem" (Atlantic Brief, pp. 6-7):

> " 'If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one.' (341 U.S. at 252)." [4]

The language quoted and relied upon by Atlantic does not support Atlantic's contention. The paragraph does no more than state that prior to enactment of the *Federal Power Act* an action at common law for active fraud and deceit was maintainable.[5] A reading of the

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[4] The *Federal Power Act,* 16 U.S.C. §§ 824, *et seq.,* and the *Natural Gas Act* are identical with respect to the Commission's rate jurisdiction.

[5] This Court pointed out, 341 U.S. at 254, that "[damage] is an essential element of remediable fraud. 'Deceit and injury must concur.' [Citation omitted.]" In the same way, injury is an essential element of a remediable breach of contract.

decision as a whole clearly discloses that the common law action did not survive enactment of the *Federal Power Act*. The following excerpt from the Court's opinion makes it certain that its holding was that plaintiff's claims were not maintainable in any forum, 341 U.S. at 251-52:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in *a judicial forum* its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even *a court* can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, *the courts* can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable." [Emphasis added.]

The Court, in the above excerpt from its opinion, is clearly speaking of any judicial forum, state or federal. The proposition that no cause of action for a rate increase exists separate from the regulatory statute is confirmed by the Court's decision in *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959).

A further answer to Atlantic's argument is found in the leading precedent for the filed rate doctrine, this Court's decision in *Texas & Pacific R.R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). That case, like the case at bar, was brought and tried in a state court

by a shipper who asserted a common law claim in its pleading that the carrier had denied it a just and reasonable rate and who sued for a refund. The defense of the carrier was that the charge made was in accordance with the carrier's tariff on file with the Interstate Commerce Commission and effective under its rules.

The trial court found that the rate was indeed unjust and unreasonable, but gave a judgment sustaining the carrier's defense. The judgment was reversed and a decree entered for the shipper by the state court, which held that the carrier had demanded and coercively collected from the shipper freight charges in excess of a reasonable compensation for the transportation.

This Court in an elaborate opinion rejected the shipper's claims for reasons which have since become known as the "filed rate doctrine," and which was applied by this Court in *Montana-Dakota.* The decision shows clearly Atlantic's error. *Texas & Pacific,* like the present case, was brought in a state court to enforce a common law claim and was defended on federal grounds. There is no procedural difference between the *Texas & Pacific* decision and the present case.

Atlantic's attempt in its brief to distinguish the case of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F.2d 388 (5th Cir. 1947), *cert. denied,* 332 U.S. 770 (1947), is even less successful. Counsel distinguishes that case from the case at bar "because the Fifth Circuit found no breach of contract."

It is clear from the court's opinion that Memphis Natural charged Mississippi Power a contract rate

which failed to reflect operation of the favored nation provision (which in that case lowered rather than raised rates). That is exactly what the Louisiana courts have held in this case amounted to a breach of contract, that is, failure of Petitioner to pay the contract price as modified by the favored nation provision. Memphis Natural in the earlier case deviated from the modified contract rate and Petitioner in the present case (according to the Louisiana courts) likewise deviated from the contract rate. The Fifth Circuit Court of Appeals in *Mississippi Power* held that without approval and implementation by the Commission, the favored nation provision could not be given effect; the Louisiana courts in the present case have held exactly to the contrary.

CONCLUSION

For each and all of the reasons set forth in Petitioner's Brief on the Merits and Reply Brief, the judgment of the court below should be reversed and the court below directed to order dismissal of Respondent's amended petition.

Respectfully submitted,

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April 10, 1981

APPENDIX

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY
REGULATORY COMMISSION

FILED RATE DOCTRINE
CONTRACT DAMAGES

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

ORDER DENYING APPLICATION FOR WAIVER OF FILING REQUIREMENTS

(Issued November 5, 1980)[1]

On May 24, 1979, Frank J. Hall, *et al.* (the Hall group) filed an application pursuant to Section 154.98 of the Commission's[2] Regulations requesting a waiver of the notice requirements contained in

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[1] This order has been modified to reflect an *errata* notice issued November 6, 1980, correcting an order posted on November 5, 1980.

[2] The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commision.

Section 4(d) of the Natural Gas Act.[3, 4] In support of its request, the Hall group asserts that timely compliance with Section 4(d) was impossible because Arkansas Louisiana Gas Company (Arkla) wrongfully concealed from the Hall group the facts which would have made such compliance possible. The effect of granting the waiver would be to allow the Hall group to collect from Arkla for the period September 1961-October 1972, a rate for gas in the Sligo field higher than that on file with the Commission. For the reasons given below, we reaffirm our conclusion that the filed rate doctrine applies and deny the waiver.

PROCEDURAL HISTORY

A. *State Court Proceedings*

On July 18, 1974, the Hall group brought a breach of contract suit against Arkla in a Louisiana court.[5] The suit concerned the proper interpretation of a favored nations clause contained in a 1952 gas purchase contract between the Hall group and Arkla. It was the Hall group's contention that royalty payments made to the United States Government by Arkla since 1961 had triggered the clause.

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[3] In addition, the Hall group filed an additional petition seeking waiver on May 29, 1980. This petition requests no additional relief.

[4] The Hall group's request for waiver is presented in the alternative. The first request, and one that would moot the waiver question, is for a finding by the Commission that the award of damages in a contract action by the Louisiana courts does not involve this Commission's jurisdiction.

[5] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699.

The Louisiana State District Court rendered a verdict in favor of the Hall group. The court found that the favored nations clause had been triggered by the U.S. royalty payments and awarded damages to the Hall group for the period from October, 1972, through December, 1975. The court concluded that it could not award the Hall group damages for the period prior to October, 1972, because such an award would constitute a rate change, and the courts do not have authority to authorize rate changes. Damages for the 1972-1975 period were appropriate, according to the court, because the Hall group was a small producer during that time, and under the Commission's Regulations, small producers were not required to make rate change filings.[6]

On review, the Louisiana Second Circuit Court of Appeal affirmed.[7] The Louisiana Supreme Court subsequently modified the decision of the lower courts, holding that the Hall group was entitled to recover for the 1961-1972 period.[8]

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[6] These findings are consistent with the view of the Commission as expressed in orders issued both before and after the Louisiana District Court's opinion.

[7] The Court of Appeal also recited the fact that the trial court had not found fraud and stated that the record would not support a finding of fraud. *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (La.Ct.Ap. 1978).

[8] *Hall* v. *Arkansas-Louisiana Gas Company*, 368 So.2d 984 (La. 1979) *cert. denied*, Oct. 1, 1979, —— U.S. ——. Arkla's Petition on rehearing of the denial of certiorari to the decisions of the Louisiana Court of Appeal is now pending in the United States Supreme Court. *Arkansas Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978. In *Arkansas-Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-1789, filed May 29, 1979, Arkla sought certiorari of the Louisiana Supreme Court's order assessing liability for the

B. *Commission Proceedings*

On September 11, 1975, Arkla filed in this docket a petition for a declaratory order construing the favored nations clause. The Commission declined to resolve the contractual dispute, stating in its March 8, 1976, order that "[i]t has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court . . . ."[9] Arkla appealed this decision to the D.C. Court of Appeals,[10] and while the appeal was pending, the Commission moved for an order remanding the record for further consideration. The Commission's request was granted by the court on May 25, 1978.

On remand, the Commission, in an order issued May 18, 1979, adhered to its earlier determination to decline to exercise jurisdiction. It did so, however, for a reason different than that enunciated in the March 8, 1976, order. The Commission stated that it "believe[d] the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous."[11] Rather, the Commission stated, the decision to defer should turn on whether the Commission finds that the issue involves a matter of "primary jurisdiction." In making this determination, the Commission stated, it would look to the following three factors:

1961-1972 period. In Sup. Ct. No. 79-1896, Arkla has sought certiorari of the judgment entered by the Louisiana district court on the remand of the damages issue.

[9] *Mimeo*, at 3.

[10] *Arkansas Louisiana Gas Company* v. *FERC*, D.C. Cir. No. 77-1146.

[11] Order issued May 18, 1979, mimeo, at 6.

(1) whether the Commission possesses some special expertise which makes the case particularly appropriate for Commision decision;

(2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.[12]

After reviewing these three factors in the context of the instant case, the Commission concluded that the assertion of jurisdiction was unnecessary. In its discussion, however, the Commission expressed the view that the Louisiana Supreme Court's award of damages for the 1961-1972 period violated the filed rate doctrine.[13]

Thereafter, the Hall group filed its application for a waiver of the notice requirements prescribed in Section 4(d). Arkla submitted a response and protest to the application on June 8, 1979. The Hall group filed a reply to Arkla's response on June 13, 1979.

POSITIONS OF PARTIES

The Hall group filed its request conditionally, contending that a waiver of the filing requirements is not necessary since Section 4(d) has no applicability to a judicial award of damages for breach of contract. The Hall group then contends that if a waiver is required, principles of law and equity establish that a waiver is justified. The Hall group argues that the only reason that it failed to comply with the notice provisions of Section 4(d) was because Arkla

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[12] *Id.*

[13] *Id.* at 10, n. 18.

wrongfully concealed from the Hall group the royalty payments which Arkla was making to the United States.

Arkla asserts that the requirements of Sectior 4(d) apply to the court-awarded damages because such damages are merely the additional prices to be paid under the 1952 contract, as interpreted by the courts of Louisiana. Arkla further asserts that the filed rate doctrine absolutely precludes the Hall group from collecting any damages for the period prior to October, 1972. Arkla also denies any allegations of wrongdoing on its part, and argues that the Hall group is simply seeking a windfall at the expense of the consumer.

DISCUSSION

The Commission has before it two issues: (1) does Section 4(d) of the Natural Gas Act apply to the matter of damages awarded to the Hall group for the 1961-1972 period? and (2) if so, is there good cause to grant waiver of Section 4(d) in this case and, further, accept the rates filed by the Hall group. Both of these questions involve the scope of and reasons for the filed rate doctrine.

A. *Applicability of Section 4(d)*

We address first the contention of the Hall group that Section 4(d) is inapplicable here. Citing *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972) and *Cities Service Gas Company* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976), the Hall group argues that a court award of damages for breach of contract is an entirely "separate and independent" issue from the question of rate obliga-

tions imposed by Sections 4 and 5 of the Natural Gas Act.

Section 4(d) of the Natural Gas Act provides that a natural gas company shall not change its rates without 30 days' notice to the Commission, unless the Commission shall, for good cause shown, waive this requirement. There is no question that had Arkla given the Hall group the notice of the government royalty payments that the Louisiana courts held Arkla was required by contract to give, the Hall group would have been required to comply with Sections 4 and 5 of the Natural Gas Act in seeking to charge the higher rate. The question, then, is whether consideration of the matter in the context of a state court contract action (involving rates for past sales) takes the matter outside the purview of the Natural Gas Act. The Louisiana Supreme Court held that it does. We disagree.

State courts—and Federal courts as well—may have a wide variety of actions between natural gas companies and their customers brought before them. Obviously, not all damage awards are barred by the Federal preemption and the assignment of regulatory responsibility to this Commission, but some are. To pick the two extremes, damages for an automobile accident between an Arkla vehicle and a Hall group vehicle are not barred, but an order in a state court action on a contract purporting to set the rate for prospective sales of natural gas in interstate commerce is barred. We believe that this case is merely the latter example presented in slightly different form, and that the policy considerations underlying the statutory and common law establishment of the filed rate doctrine dictate the conclusion that the Natural Gas Act applies to Louisiana's award of damages to the Hall group for the 1961-1972 period.

The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.

A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, "just and reasonable". As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission "exclusive powers . . . to determine what those rates are to be." *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951).

In the case before us, the effect of the Louisiana Supreme Court's holding is to permit the collection of a rate different from and higher than the rate the Hall group had on file with the Commission, and to permit the collection of this higher rate without the Commission's having determined that the different and higher rate is just and reasonable.

The Louisiana Supreme Court appears to have recognized in some respects that the award to the Hall group has the effect of increasing the rate for gas sold during the 1961-1972 period above the rate

on file during that period, but the Court applied Article 2040 of the Louisiana Civil Code to "consider fulfilled" the Section 4(c) filing requirement. 368 So. 2d at 990. But state law cannot be a legitimate basis for relieving a natural gas company of an obligation under the Natural Gas Act. What is more, the effect of the Louisiana decision is to undo the certainty of the applicable rate discussed above.

The Louisiana Supreme Court did not directly confront the question of whether it was making a just and reasonable rate determination and thus overstepping its authortiy. Rather, the Court reasoned that it was only attempting to remedy a contract breach, and that it was speculating about the Commission's likely response to a timely filing by the Hall group only for the purpose of calculating the damages that the Hall group probably suffered as a consequence of Arkla's breach. While we do not question the adequacy of this reasoning under Louisiana law, we believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

The case most closely on point is *Montana-Dakota, supra.* Although the question at issue in *Montana-*

Dakota was somewhat different, since the case arose when plaintiff sought damages grounded in fraud in a federal district court, there is much in *Montana-Dakota* to provide guidance here. In particular, the court stated (341 U.S. at 251) that "[petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [14] Thus, the most the Louisiana courts were empowered to do in this circumstance as to the 1961-1972 period was to construe the contract (the Commission having disclaimed primary jurisdiction) and reach the conclusion that under the contract the Hall group was entitled to file a rate increase application with the Commission.

Cities Service is not to the contrary. There the court found that Cities Service had breached its contractual obligation to cooperate with Western in an abandonment proceeding before the Commission. Accordingly, *Cities Service* was ordered to pay damages

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[14] Mr. Justice Jackson, speaking for the majority, stated later in the opinion (341 U.S. at 252) that "if the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act." As we have noted (fn. 5 *supra*), the Louisiana courts were unable, on the record before them, to find such active fraud or deceit. Thus we do not believe that, in this instance, the Louisiana courts have the authority to authorize a price other than the filed rate for natural gas sold in interstate commerce. However, this Commision, in determining whether good cause exists for waiver of the notice requirements of Section 4(d), may take into account and attribute appropriate weight to the withholding from the Hall group of the information necessary for the Hall group to determine that it was entitled under the contract to file a rate increase application with the Commission.

to compensate Western for the money Western had lost as a result of its inability to market its gas elsewhere. Thus, in *Cities Service*, there was no dispute between the parties regarding the proper interpretation of the price terms of their contract. Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies reflecting a putative increase in the price at which gas had been sold in past transactions.[15] Accordingly, the litigation in *Cities Service* had no impact upon the Commission's obligation to ensure that interstate sales

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[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable. As the court stated in Cities Service (535 F.2d at 1287):

> [T]he Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the natural gas act to pay the just and reasonable rate for gas served and delivered to it . . . .

By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract.

of gas are made in accordance with the rate and filing requirements prescribed in Sections 4 and 5.

B. *Merits of Hall's Request for Waiver of Section 4(d)*

This holding does not, however, end the inquiry. The Hall group has asked in the alternative that we waive the filing requirements of Section 4(d) for good cause so as to give effect to the Louisiana court's finding on the contract as of 1961.

In the circumstances of this case, we are unable to conclude that good cause exists to waive the Section 4(d) filing requirements. The basis for our view that waiver would be inappropriate is the long-established "statutory bias" against retroactive rate increases.[16] What makes the rate increases in this case particularly unacceptable is the uncommonly severe nature of the retroactivity proposed. Hall is here attempting to expose consumers to a potential liability for higher rates beginning in 1961 and continuing for some 11 years thereafter. This we simply cannot sanction.

We are also very concerned about the possible unsettling effect that a waiver in this case might have on other gas purchase transactions. If the Hall group is granted a higher rate for its gas effective in 1961, there is a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions[17] in other

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[16] *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir., 1978) describing the effect of the filed rate doctrine.

[17] In 1961, the Commission outlawed most indefinite pricing provisions in newly-executed contracts. Such provisions in existing contracts, however, could continue to operate. Order No. 232, 25 FPC 379 (1961); *The Pure Oil Company*, 25 FPC 383 (1961).

contracts in the Sligo Field geographical area, quite possibly involving pipelines other than Arkla.[18] This, of course, would open the door to additional rate increase requests and requests for waiver for the same period. As a matter of policy, we do not believe it is in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago. The potential impact of such reopenings on our regulatory responsibilities appears substantial.[19]

Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. The filing would, of course, have been based upon the Hall group's contention that a royalty payment activated its favored nations clause. Since a question of contractual authorization for the rate increase would have arisen, the Commission, we believe, would almost certainly have either suspended or rejected the filing.[20] Whether the Commission in

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[18] Our records indicate that there may be a number of contracts so affected. Some contracts signed by other pipelines contain clauses which are triggered upon the payment of a higher price by any buyer in a geographical area.

[19] We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation.

[20] The Louisiana Supreme Court assumed that the Commission would have accepted the filing, based upon the November 8, 1976, order of the FPC. 368 So.2d at 991. How-

1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; under the grounds asserted by the FPC in 1976 for disclaiming primary jurisdiction over the contract interpretation question and under the different grounds adopted by the Commission in its May 18, 1979, order, the Commission would have taken jurisdiction over the contract interpretation in 1961. At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts.[21]

We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group. But the Louisiana courts did not find active fraud or deceit in this withholding of information, and our own review of the record before us leads us to con-

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ever, neither the FPC in 1976 nor the Commission today purports to declare what the FPC's actions would have been in 1961.

[21] As we have already noted, the Commission acted in 1961 to outlaw indefinite pricing provisions and deny effect to newly-executed contracts. If the Commission had extended this policy to such clauses in existing contracts, it might have done so only where government royalty payments were involved; or it might have done so across-the-board.

clude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group. More importantly, as is discussed at some length above, we must place this particular case in the context of our broader regulatory responsibilities. And on balance, after considering the matter in this broader context, we cannot accept the potential for disruption of natural gas markets or the speculation as to how our predecessors would have acted nineteen years ago. Therefore, we deny waiver.

In summary, we find that good cause does not exist to waive notice provisions of Section 4(d). Accordingly, the Hall group's application will be denied.

The Commission orders:

The Hall group's request for a waiver of the filing requirements prescribed in Section 4(d) of the Natural Gas Act is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

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No. 78-1789

In The

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY,
Petitioner

v.

FRANK J. HALL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF ATLANTIC RICHFIELD COMPANY AS AMICUS CURIAE

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INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — (Continued)

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Pursuant to Rule 36 of the Rules of this Court, Atlantic Richfield Company (Atlantic), *amicus curiae*, respectfully submits this Brief in support of the Respondents, Frank J. Hall, *et al.* The written consent of all parties to the filing of this Brief has been separately filed. Unless otherwise noted, all emphasis herein is added.

I.

INTEREST OF ATLANTIC AS AMICUS CURIAE

Atlantic is appellant in an action presently pending in the United States Court of Appeals for the Fifth Circuit, styled *Atlantic Richfield Company v. Northern Natural Gas Com-*

pany, No. 78-1112. Oral argument was held in *Atlantic Richfield* in November, 1979, and by letter dated December 5, 1979,* the Fifth Circuit advised the parties that it was withholding its opinion pending outcome of the petition for certiorari filed in the Supreme Court in the instant case.

Atlantic Richfield is an action by Atlantic against Northern for damages for breach of contract, brought in federal court under diversity jurisdiction. In 1955, Atlantic's and Northern's respective predecessors in interest entered into a natural gas purchase contract. One provision of the contract was a favored-nations clause. It unequivocally obligated Northern to pay Atlantic higher gas prices if Northern paid a higher gas price to another producer in the same field. In September, 1973, Northern paid another producer, Phillips Petroleum Company, a higher price for comparable gas in the same field and the favored-nations clause was triggered. Northern failed to notify Atlantic of such event and thereby deprived Atlantic (until April 1975) of the opportunity to file a change in rate with the Federal Power Commission** reflecting the higher price. Although acknowledging its contractual obligation to pay the higher prices contractually due from September 1973 to April 1975, Northern refused to pay Atlantic the increased prices called for during such period by the triggered price escalation clause, claiming that it could not pay because the Commission did not authorize Atlantic to receive such higher prices until April, 1975. Northern's failure to notify of the triggering event constituted a breach of contract, according to Atlantic, for which it duly sued. Damages in the amount of approximately $582,000 were sought, those damages being measured by the difference between the higher unit price Northern

*A copy of the letter is appended to Petitioner's Brief on the Merits herein at page 26a.

**Now Federal Energy Regulatory Commission (Commission).

paid to Phillips and the lesser unit price Northern paid to Atlantic for the period in issue.

On the basis of these facts, the trial court entered judgment dismissing Atlantic's complaint for lack of subject matter jurisdiction.* In so ordering, the court reasoned that despite the fact the action was for breach of contract, it appeared to it that Atlantic was seeking a higher rate for an interstate gas sale for which no Commission approval had been granted. The court maintained that Atlantic was seeking a retroactive increase in rates, judicially promulgated, something the courts are not allowed to do. Since only the Commission has jurisdiction to determine "just and reasonable" rates for the sale of gas, the court believed it had no subject matter jurisdiction and the complaint was dismissed. In so ruling, the court simultaneously stated that Atlantic had no remedy available from the Commission because that body could neither grant money damages for breach of contract nor award retroactive rate increases. In effect, the court held that the breach of contract must be considered *damnum absque injuria*. Atlantic appealed. As stated above, the Fifth Circuit has now deferred its decision pending the outcome of the instant action.

The central issue involved in *Atlantic Richfield* is the same as one of the issues involved in the instant case. Atlantic's argument in support of Respondents will focus on that issue, which is stated as follows:

> Does the filed rate doctrine immunize the stockholders of a regulated natural gas pipeline company from a common law action for damages resulting from breach

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*The court did so by way of a Memorandum Opinion and Order, a copy of which is appended to Petitioner's Brief on the Merits herein at pages 19a-24a.

by such company of a contractual obligation to notify a regulated gas supplier of an event which triggered that supplier's right to file for a rate increase under the Natural Gas Act?

II.

SUMMARY OF ATLANTIC'S ARGUMENT

The answer to the above question is no. The Natural Gas Act and the filed rate doctrine are intended to protect natural gas *consumers* from unreasonable and excessive rates — not the *shareholders* of an interstate gas transmission company from breach of contract damages.

A contrary holding will condone and encourage the breach of binding contract obligations by the management of regulated natural gas pipeline companies by withholding from their gas suppliers essential facts peculiarly within the knowledge of the management of the pipeline companies.

Accordingly, the Louisiana Supreme Court was correct in awarding the Respondents monetary damages for Arkla's breach of contract during the 1961-1972 damage period.

III.

ARGUMENT

A. The Filed Rate Doctrine Is Not Applicable

Central to Arkla's case is its contention that the filed rate doctrine was violated by the Louisiana Supreme Court when it awarded damages measured by the difference between the rates on file during the 1961-1972 period and the contractual entitlement for that period. In this assertion, Arkla is strongly supported by both Northern and the Commission in their respective *amici* briefs. Atlantic submits that the

heavy reliance placed upon the filed rate doctrine by Arkla, Northern and the Commission is misplaced.

The filed rate doctrine states that a natural gas company cannot collect from the consumer rates for which it has not filed and received approval from the Commission. Atlantic does not question the legitimacy of the doctrine. Rather, the doctrine, properly considered, has no application to the instant case. For example, the doctrine does *not* state that a regulated natural gas supplier cannot sue for breach of contract and recover damages from a regulated gas pipeline. The doctrine does not insulate a pipeline company from liability if that company breaches a contractual duty to notify its supplier and thereby deprives the supplier of the opportunity to make a timely filing for a contractually-authorized rate increase, as is the proof in this case.

Having failed to comply with its clear, contractual duty to notify Respondents, which duty was activated by the triggered favored-nations clause, Arkla cannot invoke the filed rate doctrine and thus escape liability by claiming that Respondents' failure to timely file for a rate increase is fatal to any subsequent court proceeding, irrespective of Arkla's own breach of contract in bringing about the filing failure.

The filed rate doctrine may deny the Respondents a remedy under the Natural Gas Act, but the doctrine does not deny the Respondents a judicial remedy for Arkla's breach of contract. The filed rate doctrine only pertains to "changes in rates"* (which impact the protected consumer) and not to breaches of contract (which impact Arkla's stockholders). Money damages from Arkla's shareholders are sought, not retroactive rate increases which would be passed on to consumers.

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*See § 154.94(a) of the Commission's Regulations: No change shall be made in any rate "... without first filing a change in rates ...."

This Court's main pronouncements on the filed rate doctrine, in the natural gas field, were made in a decision rendered three years *before* it ruled that Commission jurisdiction attached to producer gas sales contracts.* That decision was *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). *Montana-Dakota* has been cited by Arkla, Northern and the Commission as unquestionably dispositive of this appeal. We submit that these parties misread *Montana-Dakota* and seek to extend it far beyond its intended embrace.

In *Montana-Dakota*, the plaintiff electric utility company, unable to claim diversity to obtain a federal forum, asserted federal jurisdiction on the grounds of (a) federal question, (b) more particularly, under a "law regulating commerce" and (c) specifically the Federal Power Act (341 U.S. at 248) and identified "as the *source of its cause of action* the Federal Power Act's requirement of reasonable electric utility rates" (341 U.S. at 250). By way of contrast, in the instant case, Respondents sued in state court on traditional breach of contract grounds. They did not assert a cause of action based upon any liability created by the Natural Gas Act.

It is crucial to note that the majority in *Montana-Dakota*, on two separate occasions (341 U.S. at 250 and 252) recognized that had the plaintiff brought its claim as a common law action** in a court of competent jurisdiction, such an action would have been maintainable and the filed rate

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*In 1954, in the case of *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, this Court held for the first time that the Federal Power Commission had jurisdiction over the prices charged by an independent producer of natural gas.

**The precise ground of the common law action (whether fraud and deceit as there, or breach of contract as here) would appear to be immaterial to the Court's conclusion.

doctrine would have posed no problem. However, *because the plaintiff elected to proceed under the Federal Power Act* (identical, in material respects, to the Natural Gas Act) in order to obtain federal court jurisdiction, it found itself subject to the limitations on the Commission's remedy powers under that Act. Mr. Justice Jackson, speaking for the majority, stated:

> "If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one." (341 U.S. at 252).

Thus, under the logic of *Montana-Dakota*, Respondents herein were properly awarded damages because their complaint was not founded upon the Natural Gas Act but rather on common law breach of contract and the relief sought (i.e., damages) will in no wise affect rates to be paid by the protected consumer. In short, Respondents, in *Montana-Dakota* language, by charting their course of passage through the state courts, avoided both Scylla and Charybdis.*

Northern ends its *amicus* brief with the following sentence from *Montana-Dakota*:

> "It is urged that this leaves petitioner without a remedy under the Power Act. We agree."

Apparently, Northern would have this Court believe that since petitioner was left without a remedy under the Power

*In *Montana-Dakota*, the petitioner's problem was "to avoid Scylla without being drawn into Charybdis." (341 U.S. at 250). In the context of that decision, Scylla was the rock of no federal forum because no diversity existed and Charybdis was the whirlpool of Federal Power Act limitations on retroactive rate-making. Petitioner therein drowned in Charybdis.

Act in *Montana-Dakota*, that Respondents should be left without a remedy under the common law in the instant case. Such reasoning does not follow. Obviously, within the sentence quoted above, there is a self-contained limitation, i.e., the "no remedy" holding is specifically linked to the Power Act. As a matter of fact, we agree that in the instant case, Respondents may be left without a remedy under the Natural Gas Act. However, Respondents did not sue under the Natural Gas Act and they did not link their requested remedy to the Natural Gas Act. A court award of damages is, we respectfully submit, entirely permitted by and consistent with the majority decision in *Montana-Dakota*.

In sum, if a gas supplier, through the breach of a contractual obligation by its natural gas purchaser, is deprived by such breach of the opportunity to seek Commission approval to receive increased prices not in excess of then existing Commission ceiling prices, the supplier loses a valuable right. Under such circumstances, it is not necessary to determine whether the Commission would have granted the increased prices if they had been filed for in order to establish that the gas supplier was injured by deprivation of the opportunity to file. The *amount* of the damage award might vary, depending on the evidence, *but the power* of the court to award damages to compensate for such injury is indisputable.

B. The True Public Policy Involved Herein

There is public policy underlying the Natural Gas Act, but it is submitted that Arkla, Northern and the Commission have left the erroneous impression that the public interest protected thereby would be adversely affected by an award of damages to Respondents. The policy behind the Natural Gas Act (and its corollaries, such as the filed rate doctrine) is the protection of natural gas *consumers* from

unreasonable or excessive rates.* But this policy was never intended to protect the *shareholders* of interstate gas transmission companies like Arkla from money damages for breach of contract. We emphasize shareholders because Arkla's private investors are the real defendants in interest in this case. If Arkla has to respond to Hall, *et al.* in money damages, the damages should come from the pockets of Arkla's shareholders, not from the consuming public.

The argument advanced by Arkla, Northern and the Commission for the application of the filed rate doctrine is predicated upon the unspoken but implicit assumption that any damages paid to Respondents would constitute an element of Arkla's jurisdictional cost of service rate base and thus ultimately be a burden upon (because paid by) Arkla's jurisdictional gas customers, in seeming contravention of the public policy behind the Natural Gas Act. It cannot be asserted, however, that an award of damages in this case will *ipso facto* be reflected in consumer rates. Indeed, the Commission's brief (typed text, page 13) recognizes that any attempt by Arkla to pass through a damage award to its consumers by way of "surcharges" would have to be authorized by Commission action in a separate proceeding. Thus, requiring Arkla to respond in damages for breach of contract in no way deprives the Commission of its power and responsibility to protect consumers from unreasonable or excessive rates.**

**See e.g., N.A.A.C.P. v. Federal Power Commission*, 425 U.S. 662 (1976) at 669-670 and cases cited therein at footnote 5.

***Socony Mobil Oil Co. v. Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir.), *cert. den.* 371 U.S. 887 (1962), prominently cited by Arkla, is inapposite. There the overcharges in issue had been passed on to the gas consumer and the refunds required by the court's decision would also be passed on to the consumer.

Arkla would have this court *equate* the admitted public interest in protecting gas consumers from uncertain or excessive rates *to* protecting the company's private shareholders from paying damages for breach of contract. We have been unable to find any case stating that one of the public policies undergirding the Natural Gas Act is protection of a regulated gas company's shareholders from responding in damages for contract breaches by their company, particularly where, as here, the rates paid by the consuming public should not be affected. Rather, the law is to the contrary. There is a widely recognized and strong public policy in favor of the sanctity of contracts, including jurisdictional gas sales contracts. As this Court itself has stated, in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 322 at 338 (1956), the Natural Gas Act does not abrogate private gas purchase contracts.

Moreover, damages for breach of a jurisdictional gas sales contract, where "just and reasonable rates" were an important component of the damage calculation, have been judicially awarded and approved. *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), appeal dismissed and *cert. den.*, 409 U.S. 1052 (1972) and *Cities Service Gas Co. v. Federal Power Commission*, 525 F.2d 1278 (D.C. Cir. 1976).

Therefore, the protestations of concern for the public interest, voiced by Arkla, Northern and the Commission in their briefs, are not warranted here. Properly viewed, the public interest at stake here is that of the sanctity of contracts and not allowing parties to jurisdictional gas sales contracts to escape responsibility for breaches by seeking refuge under the ill-fitting cloak of the filed rate doctrine. The public interest asserted by Arkla, Northern and the Commission, i.e., protection of consumers against uncertain or excessive rates, is simply not involved in this case.

In sum, the award of damages to Respondents herein should not increase the consumer's monthly gas bill and the payment of damages should have no effect on Arkla's or Respondents' rate bases. We urge this Court to clearly apprise the management of regulated gas transmission companies that the protection of consumers by the Natural Gas Act does *not* extend to protecting shareholders for breach of contract. A contrary holding would constitute an open invitation to regulated natural gas pipeline companies to withhold from their gas suppliers essential facts peculiarly within the knowledge of the gas pipeline and thereby breach with impunity otherwise binding contract obligations.

In their briefs, Arkla, Northern and the Commission frequently allude to the "public policy" or "public interest" underlying the Natural Gas Act and assert that such policy prevents Respondents from recovering money damages for Arkla's breach of contract. For example, at page 17 of its *amicus* brief, Northern apparently maintains that it can breach with impunity jurisdictional gas sales contracts. It claims that the Natural Gas Act established a public policy which precludes the Louisiana State Supreme Court from granting Respondents damages and that such "public policy cannot be avoided by private contract or Arkla's breach thereof." [Citing *Montana-Dakota, supra,* and three other cases, *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697 (1944); *Mid-State Horticultural Co., Inc. v. Pennsylvania R. R. Co.,* 320 U.S. 356 (1943); and *Scott Paper Co. v. Marcalus Manufacturing Co., Inc.,* 326 U.S. 249 (1945)]. Not one of the three last cited cases involves the Natural Gas Act and certainly none of the cases suggests that a regulated natural gas company (such as Arkla) is not answerable in court for its breach of contract.

The *Brooklyn Savings Bank* case involved a public policy embodied in the *Fair Labor Standards Act*, which prevented

an employee from waiving his right to liquidated damages. In ruling that an employer cannot defeat the protective purpose of the Act by a release based on unequal bargaining power between employer and employee, this Court specifically declared that:

> ". . . the legislative policy behind *this* enactment and issues arising under *other acts* having different legislative backgrounds are *not conclusive* in determining the legislative intent with respect to the Fair Labor Standards Act." (324 U.S. at 713).

The *Mid-State Horticultural* case involved a public policy under the *Interstate Commerce Act* which absolutely barred actions by carriers for recovery of charges unless commenced within three years from the time the cause of action accrued. Surely, such a public policy appearing in an Interstate Commerce Act case does not purport to immunize owners of a regulated natural gas company (Arkla) from damages for violating contract rights. More importantly, this Court in another case, *United Gas Pipeline Co. v. Mobile Gas Service Corp., supra,* has previously highlighted the sharp and basic difference between the Interstate Commerce Act and the Natural Gas Act:

> "In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in *marked contrast* to the Interstate Commerce Act, which in effect *precludes private rate agreements* by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts." (350 U.S. at 338).*

*This citation also serves to negate the Commission's heavy reliance in its brief herein on numerous Interstate Commerce Act cases, particularly *T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959).

Northern's third case cited for its public interest assertion, *Scott Paper Company*, involved public policy under the federal *patent* laws. There this Court ruled that the doctrine of estoppel could not be used to penalize or stop the use of an expired patent because, under the public policy of the patent laws, the public had previously paid for the invention (the expired patent) by the prior grant of a limited monopoly. Once expired, the patent became public domain and no one could change this result by private contract or estoppel. Again, it appears clear that the public policy involved in such a patent case does not extend to insulating investors in a regulated natural gas company from liability for breach of contract.

C. Pan American Petroleum v. Superior Court Is Applicable

The facts of the instant case have been stated in detail by others. In short, the Respondents filed suit in Louisiana state court for breach of a contract containing a favored nations clause. The claim was that, beginning in September 1961, Arkla breached its contract by failing and refusing to inform the Respondents of higher gas prices paid to the United States, which higher prices were said to trigger (to Respondents' benefit) the favored-nations clause.

It is submitted that the Louisiana Supreme Court was manifestly correct in upholding state court jurisdiction of such a case. The claim advanced was clearly one for traditional breach of contract and thus grounded on state law. The contract rights asserted by the Respondents in their Louisiana state court pleadings do not lose their character as such, simply because there exists a scheme of federal regulation of interstate transmission of natural gas.

This is the clear teaching of *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656 (1961). In *Pan American Petroleum,* a natural gas pipeline company sued two natural gas producers in state court for overcharges paid under compulsion of a Kansas minimum price order, which required the pipeline company to pay the producers at rates higher than those stipulated in its contracts with the producers. Both the plaintiff pipeline company and the defendant producers were subject to the jurisdiction of the Natural Gas Act. The producers argued that the Act deprived the state court of jurisdiction over the subject matter of the case. Not so, ruled this Court in a unanimous opinion. Speaking through Mr. Justice Frankfurter, the Court quoted from the Supreme Court of Delaware, which had sustained its trial court's jurisdiction in these words:

> ". . . the claims of Cities Service [the pipeline company] 'are not founded upon any liability *created* by the Natural Gas Act, but upon a private contract deriving its force from state law.'" (366 U.S. at 661, emphasis in original).

Justice Frankfurter noted that "the party who brings a suit is master to decide what law he will rely upon" (366 U.S. at 662) and declared it significant that no right of relief was asserted by the pipeline company under the Natural Gas Act. Rather, relief was predicated on the basis of alleged contracts to refund overpayments or for restitution based on unjust enrichment. He concluded that such asserted rights were traditional, common-law claims which:

> ". . . do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." (366 U.S. at 663).

The Louisiana Supreme Court, therefore, properly ruled that the case at hand involved a traditional claim for dam-

ages arising from breach of a gas purchase contract, and that such damage claim was not founded upon any liability created by the Natural Gas Act. Rather, it was founded upon a private contract deriving its force and effect from state law.

D. "Damages" vs. "Rates"

Arkla argues that the "inefficacy" of bringing an action for "damages" (rather than seeking a "rate" remedy under the Natural Gas Act as in *Montana-Dakota)* has been established by "the courts."* However, of the two cases cited by Arkla for this proposition, one is the *Atlantic Richfield* case described above, in which an appeal is pending and as to which the trial court's opinion cannot reasonably be described as precedential at this stage of the proceedings.

The other case is equally non-dispositive. That case is *Interstate Natural Gas Co. v. Southern California Gas Co.*, 102 F.Supp. 685 (S. D. Ca. 1952), affirmed, 209 F.2d 380 (9th Cir., 1953). Interstate Natural Gas Company (Interstate) sued for damages on the basis of an alleged refusal by Southern California Gas and others to transport through its pipeline system natural gas belonging to Interstate. Interstate specifically pleaded violations of the Mineral Lands Leasing Act, the Sherman Antitrust Act and the Natural Gas Act.

The Ninth Circuit held that Interstate was required to first seek relief from the Federal Power Commission before bringing a lawsuit, under the principle of primary administrative jurisdiction. It was for the Commission to decide, in the first instance, questions traditionally within its administrative expertise, such as whether the public convenience and necessity required Southern California Gas to transport any of Interstate's gas and if so, how much and at what rates.

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*Petitioner's Brief on the Merits, page 20.

Additional questions as to what facilities or services should be abandoned to accommodate Interstate would also call for Commission resolution.

Obviously, the fact situation of *Interstate* is decidedly dissimilar to the instant case. Further, the case was not pleaded as a traditional breach of contract suit. Rather, and directly germane to the present appeal, *Natural Gas Act jurisdiction was specifically invoked.* Thus, the principles of law enunciated in *Interstate* simply bear no reasonable relationship to the case at hand and they certainly do not establish that natural gas producers (such as Respondents) cannot sue for damages for breach of contract by an interstate pipeline (such as Arkla).

Indeed, there is judicial precedent directly refuting Arkla's "inefficacy" argument. *See, e.g., Cities Service Gas Co. v. Federal Power Commission, supra.* There, the District of Columbia Court of Appeals, in a case involving breach of a jurisdictional gas sales contract, ruled the following on this very point:

> "In its March 18 order the FPC correctly distinguished between Cities' obligation under the [Natural Gas] Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities' separate and independent obligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts) . . . ." (535 F.2d at 1284).

E. Mississippi Power & Light Is Not Controlling

In its *amicus* brief, Northern gives expanded treatment to *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir.), *cert. den.*, 332 U.S. 770 (1947), which it claims is "closely analagous" to the present case. Northern's heavy reliance on *Mississippi Power & Light* is not well-founded.

Not only does *Mississippi Power & Light* predate by some seven years this Court's extension of Natural Gas Act jurisdiction over gas producing companies in *Phillips, supra,* but it also was issued some four years before this Court's pronouncements on the filed rate doctrine in *Montana-Dakota, supra.* More importantly, the case is distinguishable from the case at bar because the Fifth Circuit found no breach of contract.

Memphis Natural Gas Company sued to recover from Mississippi Power and Light Company a balance claimed to be due under rates filed with the Commission for gas sold by Memphis to Mississippi. Mississippi refused to pay Memphis' filed rate and filed a counterclaim on the theory that when the "reverse" favored-nations clause* involved in the case was activated by Memphis selling at a lower rate to another buyer, Memphis was required to file a new rate schedule (for Mississippi's benefit) with the Commission. The court rejected this contention, however, and refused to impose a contractual duty on Memphis to file for a lower rate for the benefit of Mississippi when there was no such filing obligation set forth in the contract. Thus, no breach of contract occurred.

IV.

CONCLUSION

Atlantic submits the Court should affirm the judgment of the Supreme Court of the State of Louisiana in its grant to Respondents of damages for the period 1961-1972 for Arkla's

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*The favored-nations clause was a "reverse" type because it provided that the benefit of a *lower* price paid by the seller (Memphis) to another was to flow to the *buyer* (Mississippi), whereas the ordinary favored-nations clause (and the one involved in the instant appeal) provides that the benefit of a *higher* price paid by buyer (Arkla) to another shall flow to the *seller* (Respondents).

contract breach. In so doing, the Court should clearly announce to regulated natural gas pipeline companies that the filed rate doctrine protects consumers and does not immunize stockholders from a common law action for damages resulting from breach by their company of a contractual obligation to notify a regulated gas supplier of events which trigger that supplier's right to file for a rate increase under the Natural Gas Act.

Respectfully submitted,

ATLANTIC RICHFIELD COMPANY

By____________________

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No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN AND NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION of SEYMOUR WEISS, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR NORTHERN NATURAL GAS COMPANY AS AMICUS CURIAE

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INDEX

TABLE OF AUTHORITIES

Table of Authorities (continued)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR NORTHERN NATURAL GAS COMPANY AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Northern Natural Gas Company (Northern), as *amicus curiae*, respectfully submits this Brief in support of the Petitioner, Arkansas Louisiana Gas Company (Arkla). The written consent of all parties to the filing of this Brief is filed separately. All emphasis herein is added.

I.

INTEREST OF THE AMICUS CURIAE

Northern is appellee in an action involving the same basic issue as the instant case, *Atlantic Richfield Company v. Northern Natural Gas Company,* No. 78-1112, *(Atlantic Richfield)* pending in the United States Court of Appeals for the Fifth Circuit.

As reflected by the District Court's Memorandum Opinion and Order (appended to Arkla's Petitioner's Brief on the Merits at page 19a), *Atlantic Richfield* is an action by Atlantic Richfield against Northern for damages for alleged breach of contract; the failure to pay the higher rate triggered by the "favored nations" clause of a gas purchase contract between the parties. Reasoning that Atlantic Richfield, admittedly a "natural-gas company" under the *Natural Gas Act,* 52 Stat. 821, as amended, 15 U.S.C. § 717, *et seq.*, could not lawfully raise its rates to Northern without Federal Power Commission, now Federal Energy Regulatory Commission (the "Commission") approval, that Atlantic Richfield never obtained Commission approval of the higher rate for the period in question, September 23, 1973 to April 26, 1975, and that the Commission was without authority to grant reparations, Judge Higginbotham concluded that, however Atlantic Richfield may label its claim, it sought an impermissible retroactive increase in rates and, accordingly, sustained Northern's motion to dismiss. Atlantic Richfield appealed.

After oral argument, the Fifth Circuit on December 5, 1979, entered an order (Appendix, Page 1A) withholding the opinion in *Atlantic Richfield*

> "* * * pending outcome of the petition for certiorari filed in the Supreme Court in Hall v. Arkansas Louisiana Gas, 368 So.2d 984."

Northern's position in *Atlantic Richfield* is essentially the same as Arkla's position in the instant action with, however, one exception: *Atlantic Richfield,* unlike this case, does not involve the question whether a "small producer", exempt by 18 C.F.R. § 157.40 from the rate increase filing requirements of Section 4(d) of the *Natural Gas Act,* may judicially recover a retroactive rate increase. As found by the District Court in *Atlantic Richfield,* Atlantic Richfield was at all times subject to such filing requirements of the *Natural Gas Act.* Northern, as *amicus curiae,* therefore addresses the question whether the Louisiana state court properly granted to Respondents a judicial recovery of a retroactive rate increase for gas purchased by Petitioner during the period 1961-October, 1972, during which period Respondents were admittedly *not* "small producers".

II.

SUMMARY OF NORTHERN'S ARGUMENT

1. As the sale of Respondents' gas was "a sale in interstate commerce of natural gas for resale", Respondents, with respect to such sale, are a "natural-gas company" under the *Natural Gas Act* (52 Stat. 821, as amended, 15 U.S.C. § 717, *et seq.*) and an "independent producer" under the Commission's Regulations (18 C.F.R. § 154.91(a)). Respondents therefore could not lawfully demand and receive nor could Arkla lawfully pay a "rate" *(i.e.,* price) for Respondents' gas in excess of the "just and reasonable" rate determined by the Commission.

2. Absent approval by the Commission, Respondents could not lawfully demand or receive, nor could Arkla lawfully pay for gas purchased from Respondents during the period 1961-October, 1972 the increased rate triggered by the favored nations clause of the contract. Respondents

did not seek prospective approval of such rate increase by the Commission and retroactive approval has been denied by the Commission.

3. The Louisiana state court had no jurisdiction to determine, for Respondents' gas purchased by Arkla during the period 1961-October, 1972, a just and reasonable rate different from Respondents' filed rate. Therefore, the Louisiana state court could not grant to Respondents a judgment for the difference between the filed rate and the higher favored nations clause rate, because that would necessarily require a judicial determination of a just and reasonable rate different from the filed rate; a determination which the Louisiana state court had no jurisdiction to make. Jurisdiction cannot be supplied by categorizing Respondents' action as one for damages for breach of contract. No matter how the suit is cast, the subject matter is the same — Respondents seek recovery of the excess of the favored nations clause rate over the filed rate.

4. The judgment of the Louisiana Supreme Court should, therefore, be reversed, at least with respect to gas purchased by Arkla during the period 1961-October, 1972.

III.

ARGUMENT

1. The Natural Gas Act and the Commission's Regulations

Section 2 of the *Natural Gas Act* (52 Stat. 821) defines "natural-gas company" to mean

> "* * * a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Section 4 of the *Natural Gas Act* provides in pertinent part:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the sale of natural gas subject to the jurisdiction of the Commission, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time * * * and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any * * * sale subject to the jurisdiction of the Commission, * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, * * * except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge * * *. At any hearing involving a rate or charge sought

to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

The *Department of Energy Organization Act* (91 Stat. 565) established (Sec. 204) the Federal Energy Regulatory Commission and transferred to the Commission [Sec. 402(a)(1)(c)] the functions of the Federal Power Commission under Sec. 4 of the *Natural Gas Act.*

18 C.F.R. § 154.91(a) of the Commission's Regulations defines an "independent producer" as

> "* * * any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale * * *".

18 C.F.R. § 154.93 of the Regulations defines "rate schedule" to mean

> " * * * the basic contract and all supplements or agreements amendatory thereof, * * * showing the service to be provided and the rates and charges * * * applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission * * *."

18 C.F.R. § 154.92 of the Regulations provides in pertinent part:

> "(b) Every independent producer who, subsequent to the effective date of this part [June 7, 1954] proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days

> prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in §154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. * * *"

It is undisputed that, as required by the Regulations, Respondents filed the gas purchase contract, containing the favored nations clause involved in this action, with the Commission as Respondents' F.P.C. Gas Rate Schedule No. 4.

18 C.F.R. § 154.94 of the Regulations prescribing the procedures required in order to change any rate or charge, provides in pertinent part:

> "(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to §154.92, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.
>
> "(b) * * * every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission * * * shall be filed with the Commission by an original and three copies not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.
>
> "(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service * * * shall constitute a change in rate schedule."

2. The Louisiana State Court Had No Jurisdiction

The Louisiana state court had no jurisdiction to grant to Respondents recovery of the excess of the favored nations rate over the filed rate during the period 1961 — October, 1972, because that constituted a determination of a just and reasonable rate, a determination which the Louisiana state court had no jurisdiction to make. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Socony Mobil Oil Co., et al. v. Brooklyn Union Gas Co., et al.*, 299 F.2d 692 (5th Cir.), *cert. den.*, 371 U.S. 887 (1962); *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir.), *cert. den.*, 332 U.S. 770 (1947).

In *Montana-Dakota Utilities Co.* the plaintiff-petitioner, without any reference to the Commission, sought to recover judicially that part of the filed rate under the *Federal Power Act*, 16 U.S.C. 791a, *et seq.* (identical in material respects to the *Natural Gas Act)* claimed to have been fraudulently collected. This Court, in holding that the District Court was without jurisdiction and that the plaintiff-petitioner was without a remedy under the *Federal Power Act*, said (341 U.S. 250-251):

> "Petitioner gives its case a different cast by alleging that * * * its predecessor was deprived of its independence and power to resort to its administrative remedy. But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonable-

ness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.*

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

In *Socony Mobil Oil Co. v. Brooklyn Union Gas Co., supra,* Brooklyn Union, *et al.,* sued Socony Mobil, *et al.,* to require refund of contract prices received by the defend-

ants for gas which were in excess of defendants' contract rates on June 7, 1954 [date of the decision in *Phillips Petroleum Co. v. Wisconsin,* et al., 347 U.S. 672 (1954)]. The higher prices were received by defendants under the cover of orders (later vacated) staying enforcement of Commission Orders 174 and 174-A, which adopted regulations controlling and regulating rates for sales of jurisdictional gas, essentially the same regulations discussed on pages six and seven hereof. Defendants argued that the rates collected during the stay orders were legal and proper.

The Fifth Circuit disagreed (299 F.2d 695):

> "The stay orders cannot be construed as protecting Mobil and Ohio et al in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et al action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. * * *
>
> "* * * This court did not, indeed could not, authorize an increase in the lawful rates. * * *"

The Fifth Circuit went on to hold that rate changes, such as the rate increases granted to Respondents by the Louisiana state court, are forbidden absent compliance with the filing provisions of the *Natural Gas Act* and the Commission's Regulations (299 F.2d 694):

"* * * Any rate changes provided for in the contract, whether by virtue of a 'favored nations' or 'escalation' clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission."

Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F.2d 388 (5th Cir.), *cert. den.,* 332 U.S. 770 (1947), is also closely analogous to the present case. There, the gas purchase contract under which Memphis sold gas to Mississippi contained the following favored nations clause (162 F.2d 388):

"* * * It is understood and agreed that if at any time during the continuance of this agreement the Seller shall make any delivery of gas to other than the Buyer at prices *lower* than the prices provided for in this Article Fourth for similar amounts of gas and under similar conditions, the Buyer shall be entitled to purchase gas hereunder at prices as favorable to the Buyer as the prices provided for in any such contract or contracts."

During the period November 1, 1942 to July 26, 1943, Memphis sold gas to Arkansas Power & Light Company at a lower rate which, during said period would have saved Mississippi about $30,000 under the favored nations clause. Mississippi deducted this $30,000 from subsequent billings by Memphis, and Memphis sued for the $30,000. It developed that during the period from July, 1939 to July 25, 1943, Memphis sold gas to the City of Memphis at an even lower rate than the mentioned sales to Arkansas Power & Light Company, which lower rate to the City of Memphis would, if applied to sales to Mississippi, have saved $227,951

under the favored nations clause. Mississippi filed a counterclaim to recover this $227,951.

During pendency of the suit, Mississippi, on April 11, 1945, filed with the Commission a complaint to determine "the just and reasonable rate for gas delivered * * * by Memphis to Mississippi during the period from June 21, 1938 to July 26, 1943, fixing the same by order". (162 F.2d 389). The Commission ruled that it was without authority to grant the relief because, in substance, the Commission can only fix rates prospectively and not retroactively, and because (162 F.2d 389):

> "During the period from June 21, 1938, to July 26, 1943, Mississippi filed no protest or complaint with the Commission with respect to the rates charged by Memphis for natural gas sold to Mississippi. During such period, the rates charged by Memphis were regularly on file with the Commission, and the Commission did not fix any rates or charges different from those prescribed on Memphis' rates schedules actually on file with the Commission."

The trial court granted judgment for Memphis (162 F.2d 389-90):

> " * * * on the grounds that (1) the 'favored nation' clause would give Mississippi no more than the right to use it as the basis for complaint to the Commission. (2) Memphis was under no obligation to ask the Commission to implement a rate to Mississippi already granted to another distributor of Memphis. (3) Until the Commission changed the rate, the contract rate between Memphis and Mississippi was the lawfully promulgated rate."

On appeal Mississippi contended that the trial court erred because, among other things (162 F.2d 390):

> "2. It overlooked the facts as shown by the record that Mississippi did not know of the rate reduction to Arkansas until almost two months thereafter, and did not know all of the facts and circumstances surrounding such reductions until some time later; that it immediately protested and was assured by Memphis that its rates under the 'favored nation' clause would be given due consideration, and it was requested by Memphis to defer action, pending the general rate investigation of the Memphis rate structure as a whole then in process by the Federal Power Commission."

In affirming the judgment, the Fifth Circuit held that (162 F.2d 390):

> "The 'favored nation' clause became inoperative after the passage of the Natural Gas Act. * * *"

because Section 4 of the *Natural Gas Act* prescribes the only manner in which rates may be changed — by appropriate filings with and approval by the Commission. The court, in rejecting Mississippi's contention that the failure of Memphis to file a lower rate with the Commission entitled Mississippi to recover the advantages of the lower rate in a breach of contract suit, said (162 F.2d 390-391):

> " * * * No matter how Mississippi may contort the effect of the 'favored nation' clause, the act places upon the 'gas distributing company', here Mississippi, or the Commission itself the power of instituting a hearing to determine whether a rate is proper under the terms of the act. Under section 5 the Commission may consider discrimination and preference in setting a rate. Rate-making is a legislative function that the

courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate to transfer the legislative function of rate-making from the Commission to the courts. For the court to place a contractual duty on Memphis to file a new rate schedule would be tantamount to forcing new rates on Memphis without permitting its recourse to the Commission."

Finally, in answer to Mississippi's complaint that, because the Commission cannot set rates retroactively, it would be necessary that Mississippi have instantaneous knowledge of the lower rate charged by Memphis, the Fifth Circuit held (162 F.2d 391):

"Mississippi argues that, since the Commission has held it may not set retroactive rates, to require it to go before the Commission to obtain a lower rate in advance of deliveries would require it to have instantaneous knowledge of the lower rate extended by Memphis to another customer and would require the Commission to obtain immediate action. Congress has made certain provisions for these hardships, and supplication for further relief must be addressed to that body. * * *"

That the doctrine of *Montana-Dakota Utilities Co.* and similar cases discussed above applies here is emphasized by the Commission's November 5, 1980 Order in Docket No. RI76-28, denying Respondents' application for waiver of the filing requirements of the *Natural Gas Act* and the Commission's Regulations (App., pp. 1a-15a, to Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *amici curiae*).

That Respondents' favored nation clause does not create a cause of action independent of the *Natural Gas Act* and

the Commission's Regulations is further confirmed by *Wisconsin, et al.* v. *Federal Power Commission, et al.*, 373 U.S. 294 (1963). That case involved, among other things, the effect of "spiral escalation clauses" contained in certain contracts under which Phillips Petroleum Company sold natural gas. Under these spiral escalation clauses, when a specified commodity price index increased more than a certain number of points and the purchaser had obtained a general increase in its resale rate for the gas, the rates at which Phillips sold gas to that purchaser could be increased. The net effect of such spiral escalation clauses was substantially the same as Respondents' favored nations clause. Concerning the effect of the spiral escalation clauses this Court said (373 U.S. 304):

> "* * * *The effect of a contract clause of this type, of course, is only to permit the producer to resort to the filing provisions of § 4(d) of the Act.* If the increase is challenged, the producer must still establish its lawfulness *wholly apart from the terms of the contract.* * * *"

This is but another way of stating what this Court said in *Montana-Dakota Utilities Co., i.e.*, "Petitioner cannot separate what Congress has joined together." (341 U.S. 251).

This Court has made very clear that the doctrine of *Montana-Dakota Utilities Co.* is not diluted by cases finding the existence of an implied, private cause of action to support statutory rights, *Cannon* v. *University of Chicago, et al.*, 441 U.S. 677 (1979), or by cases applying the abstention doctrine, *United States* v. *Michigan National Corp., et al.*, 419 U.S. 1 (1974). In *Cannon*, in which an implied, private cause of action was found to exist under Title IX of the Education Amendments of 1972 (20 U.S.C.S. § 1681, *et. seq.*), this Court, after discussing certain statutes which it

had construed to create private remedies, pointed out (441 U.S. 690):

> "The language in these statutes — which expressly identifies the class Congress intended to benefit — contrasts sharply with statutory language customarily found in * * * other laws enacted for the protection of the general public. * * *"

The Court expanded on this distinction in its footnote 13 (441 U.S. 690):

> "Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. See * * * T.I.M.E., Inc. v. United States, 359 U.S. 464 * * * ('duty of every common carrier . . . to establish . . . just and reasonable rates . . .'); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 * * * (similar duty of gas pipeline companies). * * *"

In *United States v. Michigan National Corp., et al.,* this Court, in holding that the action at hand was an appropriate one for application of the abstention doctrine, pointedly distinguished that case from the instant case. In its Footnote 2 (419 U.S. 4) the Court said:

> "2. We may put to one side cases * * * in which Congress, by depriving the agency of a remedy, is deemed to have withheld it from the courts as well, e.g., Montana-Dakota Utilities Co. v. Northwestern Public Service Co. 341 US 246 * * * (1951). *In such cases, the court must of course dismiss the action.*"

The Natural Gas Act and the Commission's Regulations having been enacted and adopted in the public interest [to

the above authorities may be added *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), *reh. den.,* 392 U.S. 917 (1968)], establish a public policy which precluded the Louisiana state court from granting to Respondents the recovery sought for the period 1961-October, 1972, and that public policy cannot be avoided by private contract or Arkla's breach thereof. *Montana-Dakota Utilities Co., supra; Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697 (1944); *Midstate Horticultural Co., Inc. v. Pennsylvania R.R. Co.,* 320 U.S. 356 (1943); *Scott Paper Co. v. Marcalus Manufacturing Co., Inc.,* 326 U.S. 249 (1945).

Pan American Petroleum Corp., et al. v. Superior Court of the State Delaware in and for Newcastle County, et al., 366 U.S. 656 (1961) is not to the contrary and does not support the proposition for which the Louisiana Supreme Court cites it (368 So.2d 989), namely, that contract violations are not subject to the Commission's jurisdiction. *Pan American Petroleum Corp.* simply restated the settled rule that the question of federal question jurisdiction is to be determined from the allegations of the plaintiff's complaint; if the action is cast as a breach of contract suit, there is no federal question jurisdiction even though the defendant, as does Arkla here, has a defense based on the *Natural Gas Act* and the Commission's Regulations.

Of course the Commission has no jurisdiction to award reparations-damages for breach of contract. But it is equally clear, under the above authorities, that the Louisiana state court, when Arkla pleaded and proved the filed rate doctrine as a defense, was also without jurisdiction to grant a judgment for damages for breach of contract.

As the Louisiana Supreme Court observed, the *Natural Gas Act* does not "abrogate private gas purchase contracts" (368 So.2d 984). But *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956), cited by the Loui-

siana Supreme Court, does not support, but negates, that court's conclusion that an award of damages for Arkla's breach of contract was properly made despite the failure of Respondents-Plaintiffs to comply with the Commission's Regulations. The *Natural Gas Act* contemplates a system of private contracting, but that system must function, and the enforcement of the rights and obligations of the contracting parties must be in conformity, with the public interest, as defined in the *Natural Gas Act* and the Commission's Regulations. *Permian Basin Area Rate Cases,* 390 U.S. 747, *reh. den.,* 392 U.S. 917 (1968). There, this Court, in upholding the validity of the Commission's order limiting the application of favored nations, spiral escalation and price redetermination clauses (even when supported by rate increase filings as required by the Commission's Regulations) to prices no higher than the area maximum rates, held (390 U.S. 783-84):

> "We think that the Commission did not exceed or abuse its authority. Section 5(a) provides without qualification or exception that the Commission may determine whether 'any rule, regulation, practice, or contract affecting . . . [any] rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ,' and prescribe the 'rule, regulation, practice, or contract to be thereafter observed . . .' Although the Natural Gas Act is premised upon a continuing system of private contracting, United Gas Co. v. Mobile Gas Corp., supra, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests. * * * We need not, for present purposes, calculate what collateral consequences, if any, the Commission's order may have for the terms or validity of the contracts it reaches; we hold only that the Commission has here

permissibly restricted the application of indefinite escalation clauses."

That Respondents, for the period 1961-October, 1972, are left without a remedy for Arkla's breach of contract is not unusual; that result is entirely predictable and, as demonstrated by the above authorities, it is the law as announced by this Court. Which, in the final analysis, brings us back to *Montana-Dakota Utilities Co.* (341 U.S. 254):

"If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

"It is urged that this leaves petitioner without a remedy under the Power Act. We agree. * * *"

IV.

CONCLUSION

Northern submits that the Court should reverse the judgment of the Supreme Court of the State of Louisiana, at least insofar as that judgment grants to Respondents a recovery of a rate in excess of the filed rate for gas sold to Petitioner during the period 1961-October, 1972.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

Fifth Circuit

Gilbert F. Ganucheau
Clerk

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December 5, 1979

TO ALL COUNSEL OF RECORD

No. 78-1112 — *Atlantic Richfield Company v Northern Natural Gas Company*

Dear Counsel:

Please be advised, that the opinion in the above referenced case will be withheld pending outcome of the petition for certiorari filed in the Supreme Court in Hall v Arkansas-Louisiana Gas, 368 So.2d 984.

Very truly yours,

Gilbert G. Ganucheau, *Clerk*

By S/RICHARD E. WINDHORST, JR.

Richard E. Windhorst, Jr., *Chief Judicial Support Division*

REW:mlv

Messrs. James R. Coffee and
Albert D. Hoppe
Messrs. Edward Kliewer, Jr. and
Stephen R. Anderton
Mr. Patrick J. McCarthy

No. 78-1789

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

The United States and the Federal Energy Regulatory Commission will discuss the following question:

Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the Supreme Court of Louisiana violated the "filed rate" doctrine in holding that respondents are entitled to damages in excess of rates on file with the Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued — Page

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

In Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, Congress granted the Federal Energy Regulatory Commission [1] sole authority to determine the "reasonableness" of rates charged by natural gas companies for sales or transportation of natural gas subject to the Commission's jurisdiction. Under Section 4 of the Act, such rates must be filed with the Commission. After filing, the rates are subject to review by the Commission, which may order a

[1] Under 42 U.S.C. (Supp. II) 7172(a)(1)(C), (D), (E), and (F), this agency has succeeded to the relevant functions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

refund of any portion of the new rates that is found to be excessive. Under Section 5 of the Act, however, the Commission is specifically prohibited from granting reparations for existing rates that are determined to be "unreasonable." The Supreme Court of Louisiana has drastically departed from this statutory scheme by holding that a party to a contract involving sales of natural gas subject to the Commission's jurisdiction under the Act may be awarded damages reflecting higher rates it was entitled to receive for past sales under the contract even though that party did not file new rate schedules with the Commission as required by the Act. Both the Commission and the United States have an interest in assuring that the purposes of the Act are not thwarted.

On October 1, 1979, the Court invited our views on the then pending petition for certiorari in this case. In our responses, we urged that the Court grant the petition and reverse the judgment of the Supreme Court of Louisiana. In this brief we amplify our reasons for urging reversal of the judgment below.

STATEMENT

In 1952 respondents, producers of natural gas, entered into a contract to sell gas to petitioner Arkansas Louisiana Gas Company ("Arkla"). The contract set forth a schedule of fixed prices, including increases in specific amounts to be effective every five years up to an agreed maximum. The contract also contained a further price escalation provision, known as a "favored nations clause," under which respondents were entitled to additional price increases if Arkla purchased gas at higher rates from any other "party seller" in the Sligo field of Northern Louisiana. After 1954, respondents obtained a certificate from the Commission to sell the gas under

the contract, and filed the contract and each of the scheduled increases in the fixed price with the Commission.

In 1974 respondents sued Arkla in Louisiana state court for breach of contract.[2] They claimed that Arkla had obtained certain leases in the Sligo field from the United States in 1961 and that Arkla's payments to the United States for gas and liquids produced from the leasehold had triggered respondents' right to higher prices under the favored nations clause.

Arkla denied the claims. It also moved the state court to dismiss the action on primary jurisdiction grounds and petitioned the Commission for a declaration that its lease payments had not triggered the favored nations clause. After several decisions and a remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission denied Arkla's petition on May 18, 1979 (see Amici Br. App. 1a-15a).[3] The Commission held that under the circumstances of this case, it would decline to exercise primary jurisdiction in respect to what it viewed as essentially a dispute over contract issues that do not require the Commission's expertise or implicate policies under the Natural Gas Act (*id.* at 7a-13a). It concluded that those were matters that could and should be resolved by the state courts; it also expressed the view, however, that it would be contrary to the Natural Gas Act and the filed rate doctrine for the state courts to award respondents

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[2] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699 (July 30, 1975).

[3] "Amici Br." refers to our initial response to the petition for certiorari in this case; "Amici Supp. Mem." refers to our supplemental memorandum at the petition stage.

damages for the period prior to 1972, when respondents acquired "small producer" status and were thus relieved of an obligation to file their rates with the Commission (*id.* at 12a n.18).[4] In other words, the Commission concluded that, prior to 1972, the amounts to which respondents were lawfully entitled were limited to the specific rates on file with the Commission and thus they could not be awarded an additional amount for that period based on an alleged breach of contract.

In the meantime, the state courts adjudicated respondents' contract action. The state trial court held that Arkla's payments to the United States after 1961 had triggered the favored nations clause; but it also held that under the filed rate doctrine respondents could obtain damages only for the period after 1972. The Louisiana Court of Appeal, Second Circuit, affirmed both aspects of the trial court's holding (78-986 Pet. App. 2a-20a; 359 So.2d 255 (1978)). The Supreme Court of Louisiana thereafter denied Arkla's application for a writ to review the Court of Appeal's decision. Arkla then filed a petition in this Court for a writ of certiorari to review the decision of the Louisiana Court of Appeal refusing to refer the interpretation of the favored nations clause to the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-986. In response to the Court's invitation, the Commission and the United States filed a brief expressing the view that the Court of Appeal's decision was correct and that the petition should be denied. This Court denied the petition on October 1, 1979 (444 U.S. 878), and denied rehearing on July 2, 1980.

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[4] A "small producer" is defined in the Commission's regulations as an independent natural gas producer whose total sales in certain categories do not exceed 10 million Mcf per year. 18 C.F.R. 157.40.

2. After denying Arkla's petition for review, the Supreme Court of Louisiana granted respondents' petition for review and reversed that part of the Court of Appeal's decision limiting respondents' recovery to the period after 1972. The Supreme Court of Louisiana concluded that Arkla had prevented respondents from making appropriate rate filings with the Commission before 1972 by not informing respondents of its lease payments; that the Commission would have approved respondents' filings for a rate increase; and that respondents should therefore be allowed to recover damages for the entire period between September 1961 through December 31, 1975 (Pet. App. 83a-99a). In so ruling, the court did not believe that Arkla's "bad faith or fraud (or lack thereof) [was] relevant to a determination of whether it has prevented the fulfillment of a condition under which it [was] bound" (*id.* at 93a n.6).[5]

ARGUMENT

A. Introduction and Summary

Congress has provided in Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a), that all rates and charges of natural gas companies in connection with

[5] While Arkla's petition for certiorari in the instant case was pending, respondents filed with the Commission an application for a waiver of the Commission's filing requirements, on the apparent theory that if the Commission granted such a waiver the filed rate doctrine would not bar their recovery of damages for the period prior to 1972. The Commission denied the application on November 5, 1980 (Amici Supp. Mem. App. 1a-15a).

Arkla has also filed a separate petition for certiorari (No. 79-1896) to review whether, in calculating the damages awarded to respondents for breach of contract, the Louisiana courts permitted respondents to recover rates for sales of natural gas in excess of applicable rate ceilings established by the Commission. That petition is still pending.

the sale and transportation of natural gas subject to the Commission's jurisdiction "shall be just and reasonable"; any rate or charge "that is not just and reasonable is declared to be unlawful." A natural gas company is not required to seek the Commission's approval before putting its rates into effect. However, the company must file with the Commission a schedule showing all rates and charges subject to Commission jurisdiction, and it may not change its filed rates and charges without advance notice to the Commission and the public. 15 U.S.C. 717c(c), (d).[6] If the Commission, after a hearing had upon a complaint or on its own initiative, determines that existing rates or charges are unreasonable, then it may establish reasonable rates "to be *thereafter* observed and in force * * *." 15 U.S.C. 717d(a) (emphasis added). The primary purpose of this statutory scheme—and of the "substantially identical" provisions of the Federal Power Act (16 U.S.C. 824d, 824e) *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)—is to protect consumers from excessive rates and charges. See *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972); see also *FPC* v. *Sierra Pacific Power Co., supra*, 350 U.S. at 355.

It is thus settled under the Natural Gas Act that only those rates duly filed with the Commission are the lawful, collectible rates and only the Commission has the authority to determine the reasonableness of such rates. In accordance with these principles, a

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[6] The Commission may suspend the new rates for up to five months, after which they may be collected, subject—in the case of increased rates—to refund (with interest) of that portion of the increased rates which the Commission finds is not justified. 15 U.S.C. 717c(e).

regulated company may not set rates to recoup past losses, nor may the Commission award damages or reparations to injured parties for unreasonable past rates. See *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 152-153 (1962); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). See also, *e.g.*, *Public Service Co. of N. H.* v. *FERC*, 600 F.2d 944, 957-958 (D.C. Cir.), cert. denied, 444 U.S. 990 (1979); *Maine Public Service Co.* v. *FPC*, 579 F.2d 659, 663-664 (1st Cir. 1978).

The Supreme Court of Louisiana nonetheless held in this case that respondents were entitled to collect more than the amount provided for in the filed rate. The court below acknowledged that petitioner "was only bound to pay [respondents] a higher price if [respondents] filed new rate schedules with the Commission" (Pet. App. 92a). The court noted, however, that respondents "were effectively precluded from making the requisite filings because they were not, at any time, informed by [petitioner] that it was, in fact, paying a higher price to another party seller" (*ibid.*). The court concluded that if respondents had in fact followed the proper filing procedures, "it was more probable than not that the Commission would have approved a contractually-authorized price increase" (*id.* at 94a).

As we explain more fully below, this ruling is contrary to the "filed rate" doctrine as it applies to the Natural Gas Act, is inconsistent with the closely related legislative rule that the Commission has no power to grant reparations under the Act, and is at odds with the decisions of this Court in this area. Accordingly, we submit that the judgment of the Supreme Court of Louisiana should not be allowed to stand.

B. The "Filed Rate" Doctrine Bars Courts From Passing Upon The Reasonableness Of Previously Filed Rates

The "filed rate" doctrine rests upon a complex of considerations that reflects the congressional conclusion in a particular regulatory scheme that rates should be embodied in tariffs on file with the regulatory agency and that the "crucial question of [the] reasonableness [of rates should] not be decided by the courts." *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 473 (1959). In its initial formulation, the rule, which became a central element of the Interstate Commerce Act of 1887, sought to remedy the open resort to discriminatory practices by railroads during the middle of the Nineteenth Century. As one leading commentator on that Act observed:

> These railroad discriminations assumed many forms, but none was more glaringly unjust or more obviously destructive of sound economic development than the grant of personal preferences to favored shippers. The published classifications and tariffs were also so adjusted in numerous instances as to inure to the special advantage of particular localities and types of traffic and to the distinct prejudice of other places and commodities. Sharp resentment at the manifest injustice and baleful consequences of the rebating evil and at the subversive industrial tendencies inherent in rate maladjustments was the most potent factor leading to federal legislation.

1 I. Sharfman, *The Interstate Commerce Commission* 17-18 (1931) (footnote omitted).

Following the enactment of the Interstate Commerce Act, this Court explained that the primary purpose of the Act, in seeking to prevent unjust and unreasonable rates,

> was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs * * *. For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.

New York N. H. & H. R. R. v. *ICC*, 200 U.S. 361, 391-392 (1906). To achieve this end, "[t]he tariff, so long as it was [in] force was * * *to be treated as though it had been a statute, binding upon Railroad and shipper alike." *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 197 (1913). In a subsequent case, the Court emphasized that "[u]nder * * * the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property." *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (footnotes omitted). In keeping with this rule, the Court held that without an official change in rates, the parties cannot, even by contract, lawfully alter the published rate. *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242 (1906). In short, the filed rate doctrine establishes a system whereby "rates * * * should have a uniform application to all and * * * should not be departed from so long as the established schedule remain[s] unaltered in the manner provided by law."

Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907).

The doctrine serves both to give the public notice of proper rates (*Louisville & Nashville R.R.* v. *Maxwell, supra*) and to insure adherence to the regulatory scheme. *Dayton Iron Co.* v. *Cincinnati, N. O. & T. P. Ry.*, 239 U.S. 446, 451 (1915); *Mitchell Coal Co.* v. *Pennsylvania, R.R.*, 230 U.S. 247, 259 (1913). The considerations underlying the rule are "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976). See *City of Piqua, Ohio* v. *FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979).

It is clear that the salutory goals of equality and certainty of rates would be frustrated by recognizing an authority in the courts, separately and independently from the regulatory agency, to pass upon the reasonableness of rates. As this Court explained in the landmark *Abilene* case (204 U.S. at 441), "the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

Under the filed rate doctrine, therefore, "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and * * *, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable

one." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 251-252. The decision in *Montana-Dakota* establishes that the courts are "bound to defer to the Commission's primary jurisdiction in the matter of rates, and utilities are prohibited from demanding and collecting rates other than those filed with the Commission." *Maine Public Service Co.* v. *FPC, supra,* 579 F.2d at 666.

C. The Statutory Prohibition Of Retroactive Ratemaking By The Commission Also Bars The Courts From Awarding Reparations for Unreasonable Past Rates

Under the Natural Gas Act the Commission is barred from retroactively substituting a just and reasonable rate for a past rate that has been found unreasonable. *FPC* v. *Tennessee Gas Co., supra,* 371 U.S. 152-153; *FPC* v. *Sierra Pacific Power Co., supra,* 350 U.S. at 353; *FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 618. The statutory scheme leaves no room for regulated companies to achieve indirectly, through judicial proceedings, what they may not obtain directly from the Commission. This conclusion follows from this Court's decision in *T.I.M.E. Inc.* v. *United States, supra.*

T.I.M.E. Inc. involved the question whether under the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act) a shipper of goods by a certificated carrier had a cause of action for the recovery of past rates paid by it on the ground that such rates were unreasonable, even though the rates had been duly filed with the Interstate Commerce Commission. The Court rejected the argument advanced by the dissenters (359 U.S. at 482 (Black J., dissenting)) that only if there was a reparations provision in the statute could it fairly be concluded that the existence of primary jurisdiction in the Commission precluded a common-law right of shippers to sue

for damages caused by unreasonable rates.[7] Instead, the majority concluded that

> [i]t would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I. C. C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for.

359 U.S. at 474.[8]

The decision of the Court in *T.I.M.E. Inc.* is of particular relevance here because the Court in that case specifically reaffirmed the rule, previously adopted in *Montana-Dakota,* that the filed rate doctrine does not depend for its existence upon a statu-

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[7] In focusing upon the presence or absence of a reparations provision as dispositive, the dissent noted that in the *Abilene* case the Court interpreted the inclusion of a reparation provision in Part I of the Interstate Commerce Act (relating to rail carriers) as implying that Congress had intended to supplant "the pre-existing common-law right of shippers to sue for damages caused by unreasonable rates * * *." *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 482 (Black. J., dissenting).

[8] In 1965, following the decision in *T.I.M.E. Inc.,* Congress amended the Motor Carrier Act to allow shippers to sue for reparations. Pub. L. No. 89-170, Section 6, 79 Stat. 651. See *ICC* v. *B & T Transportation Co.,* 613 F.2d 1182, 1185-1186 (1st Cir. 1980).

tory reparations provision. In *Montana-Dakota* the court had concluded that "[t]he fact that Congress withheld from the Commission the power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly." 341 U.S. at 254. (footnote omitted).

Moreover, in attempting to distinguish the Motor Carrier Act of 1935 from the Federal Power Act, the statute at issue in *Montana-Dakota,* the dissenters in *T.I.M.E. Inc.* agreed that the policies underlying the Federal Power Act would not be served by allowing refunds for past rates found to have been excessive. 359 U.S. at 491. The dissenters noted that the core purpose of the Power Act was "to benefit consumers by holding down wholesale prices." 359 U.S. at 491. They observed that in *Montana-Dakota* the Court had indicated that "the consumers would not be helped by *ex post facto* determinations of unreasonableness resulting in a refund to wholesalers." 359 U.S. at 491.[9]

D. Application Of The Foregoing Principles To This Case Clearly Warrants Reversal Of The Determination Of The Supreme Court Of Louisiana

We have shown that, in light of the regulatory scheme established by the Natural Gas Act and the decisions of this Court in *Montana-Dakota* and *T.I.M.E. Inc.*, no extra-statutory remedy exists pursuant to which a court may in an independent action

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[9] In the dissenters' view this was wholly different from the Motor Carrier Act involved in *T.I.M.E. Inc.*, where refunds would go to shippers who, "in many instances, [are] the ultimate parties on whom the burden falls." 359 U.S. at 492.

reassess the reasonableness of rates duly filed with the Commission. In addition, the absence of a reparations provision in the Natural Gas Act provides no basis for concluding that the courts may order reparations in compensation even for unjust or unreasonable rates. These principles demonstrate that the decision below is erroneous.

To be sure, respondents have brought this action under a breach of contract theory, and not on the ground that they may challenge the previously filed rates as having been unreasonable. But in awarding damages to respondents for Arkla's alleged breach of contract, the court below was forced to speculate as to whether or not the Commission "would have approved a contractually-authorized price increase if the proper filing procedures had been followed" (Pet. App. 94a).[10] Under the filed rate doctrine, however, it was not proper for the court to assume that the Commission would have accepted the higher rates as reasonable. The determination of reasonableness was for the Commission alone to make.[11] As the Commission observed in denying respondents' application to waive the filing requirements of the Natural Gas Act (Amici Sup. Mem. App. 9a):

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[10] The court noted that "[n]o evidence was adduced by [Arkla] to establish that Commission approval would have been unlikely" (Pet. App. 94a).

[11] The Louisiana Court of Appeal correctly rejected respondents' contention that the filed rate doctrine is inapplicable because the instant action is for damages and not for a retroactive price increase. "The action for damages to be successful necessarily assumes a price increase would have been granted by the FPC. That such approval would have been granted by the commission is highly speculative and cannot serve as a basis for an award of damages" (78-986 Pet. App. 14a).

> [W]e believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

Moreover, the Commission is not now in a position to make a post hoc determination regarding the reasonableness of the rates that respondents would have charged Arkla in the period between 1961 and 1972.[12] The Commission would, in any event, be precluded by Section 5(a) of the Act (15 U.S.C. 717d(a)) from approving retroactive ratemaking. Under this Court's decisions in *Montana-Dakota* and *T.I.M.E. Inc.*, the Louisiana courts are similarly precluded.

This result is consistent with the statute's central purpose of benefitting consumers by holding down wholesale prices. The actual consumers of the gas, Arkla's past customers, have already paid for the gas, and any surcharges that Arkla may be permitted to levy in order to recover for the damages awarded to

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[12] In its decision on respondents' waiver application, the Commission refused to speculate "as to how our predecessors would have acted nineteen years ago" (Amici Supp. Mem. App. 15a).

respondents would fall on a different group of customers. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 254; *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 491 (Black, J., dissenting).

Finally, we note that the Louisiana Court of Appeal found the evidence insufficient to support an allegation of fraudulent concealment (78-986 Pet. App. 14a) and the Louisiana Supreme Court concluded that the issue of bad faith or fraud was irrelevant here (Pet. App. 93a n.6). This case thus does not present the question whether the filed rate doctrine and the statutory prohibition of retroactive ratemaking would bar a judicial award of damages in a case involving active fraud.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted.

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